AT A OF THE APPELLATE COURT,

Begun and held at Ott on Tuesday, the seventh day of April, in the year of our one thousand nine hundred and fourteen, within and for the ond District of the State of Illinois:

Present--The Hon. DUAN. CARNES, Presiding Justice.

Hon. DORRE DIBELL, Justice.

Hon. CHAR WHITNEY, Justice.

CHRISTOPH C. DUFFY, clerk.

J. G. MI HKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5962.

Estate of Christian Wresche,

(Emma Ackman, appellant.)

ve Appeal from McHenry.

Christian C. Wresche, et al

appellees.

188 I.A. 1

Whitney J.

The will of Christian C. Wresche seems to have been admitted to probate in the county court of McHenry County and an appeal taken by two of the heirs to the circuit court where there was a hearing in which the testimony of the subscribing witnesses was introduced. This testimony is apparently technically correct except that there is nothing in the record to show that the paper witnesses were talking about and which they swore they signed and which the testator signed, was the will. ~~It is perfectly obvious that the witnesses were testifying about but the record does not technically show that it was the will.~~ The circuit court probably not observing that fact denied the motion of the appellant heirs to find against the will, and entered judgment finding that it was the will. Appellees filed no briefs. We are asked to reverse without remanding but this we should not do. The case should be reversed and remanded for another trial.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

1224

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

188 I.A. 2

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5963.

The People &c. appellee

vs Appeal from DuPage.

Louis Thexton, appellant.

Whitney J.

188 I.A. 2

This is a suit prosecuted against Louis Thexton appellant by the people to recover a penalty for the violation of the automobile law, the offense charged being, running at a rate of speed prohibited by the statute. Judgment was entered against appellant for $5.00 penalty from which this appeal was prosecuted.

Appellant insists that the evidence does not show the automobile was running at a speed exceeding 15 or 30 miles an hour in a corporate village, and also insists that a higher rate of speed is not a violation of the law, except under the conditions named in the statute and that there was no proof of those conditions. This question of fact was submitted to the court for determination on conflicting evidence and in the opinion there is sufficient evidence in the record to support the finding of the court and sufficient to prohibit us from reversing on that ground. It is insisted it must appear there was a wilful violation of the statute before the penalty could be imposed and that "wilful" means wicked, wanton and with the intention to do something wrong. This is to recover a statutory penalty for the doing of things prohibited by the statute. The only intention necessary is ~~in doing of~~ to do the act prohibited. It is insisted by the people that this case is improperly here; that it was a criminal case and that the only way it could be brought to this court was by writ of error. Had the people made a motion to dismiss the appeal for this reason it would un-

Dec. 10, 1900.

The Davis Co. Monitor:

vs

Louis Tiedeman, Monitor.

Motion.

1 8 0 1 . 2

[illegible]

doubtedly have prevailed, but it waived this right by joining in the stipulation as to the bill of exceptions and filing briefs in this court. (Ferrias v The People 71. Ill. App. 560 and cases there cited.)

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5965.

The People ex rel. appellees.

vs Appeal from Co. Ct. Marshall.

John DeWalt, appellant.

Whitney J.

188 I.A. 3

John DeWalt, appellant, was convicted of being the father of a bastard child of Emily Jane Ray. This appeal is prosecuted from the judgment entered in that case. Appellant was a man with a family and Emily Jane Ray was his wife's half sister. The only evidence in the case in regard to the alleged intercourse from which the child was conceived was that of Emily Jane Ray and appellant. Emily Jane Ray swore that appellant was the father of the child, and he testified he was not, and that he had never done any of the things leading up to the alleged intercourse. The testimony of Emily Jane Ray is of such an unsatisfactory and contradictory character that it does not produce a favorable impression upon this court. When she testified on the trial resulting in the judgment which is appealed from, it was the fifth time she testified concerning the same facts. There had been two previous trials of this case, the record of which trials are not in the record in this case, but the facts are stated in the briefs and not questioned. She had been a witness twice in a suit for seduction brought by the father against appellant. We might ~~under certain circumstances~~ feel compelled to affirm under this testimony, the case having been submitted to a jury and they having passed upon the questions of fact, but there is sufficient error in one of the instructions given for the people to require a reversal of the judgment on the ground of the giving of that instruction alone. By that instruction the jury were told that the

most convincing evidence was on the side of the people. Evidently something was omitted from this instruction. The jury were also told by this instruction that the law is that the most convincing evidence was on the side of the people without regard to the number of witnesses. The number of witnesses is an element which should always be taken into consideration by the jury. Such an instruction was calculated to mislead the jury and a new trial should be given. Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5838.

188 I.A. 6

Commissioners of Highways.

vs

Appeal from Whiteside.

Drainage Commissioners.

Per Curiam.

The commissioners of highways of the town of Tampico in Whiteside county filed an amended petition against the Drainage Commissioners of Drainage District No. 2 of Tampico and Hahnaman Townships in Whiteside County for a writ of mandamus to compel the Drainage Commissioners to replace a bridge over a drainage ditch where said ditch crosses a certain highway and to levy an assessment therefor if necessary. The respondents filed an answer and pleas. A demurrer was sustained to certain pleas and issues were joined on the answer and the rest of the pleas. A jury was waived, proofs were heard and a mandamus was awarded pursuant to the prayer of the amended petition. This is an appeal by the respondents from said judgment.

At the October Term 1913 we considered this case and decided it by a majority vote. The preparation of the opinion of the majority was assigned to Mr. Presiding Justice Whitney who was one of the majority. He was afterwards taken ill and died on July 18, 1914. One of the remaining members of the court is of the opinion that the judgment should be affirmed and the other that it should be reversed without remanding. An opinion upon the merits cannot be prepared until after a successor to Judge Whitney has been appointed, which apparently cannot be earlier than October 1914, and until the new member of the court has had time to consider said cause in connection with his other duties. It is apparent to us that either every party may be defeated; it will not be satisfied to abide

Gen. No. 1024.

Commissioners of Highways.

vs

Dearborn Commissioners.

Par 0 ktem.

1824.6

The commissioners of highways of Dearborn in Dearborn county filed an amended petition for the Dearborn Commissioners of Highways to build a bridge and have Dearborn Township Dearborn County, Indiana to contribute to the Highways Commissioners to build a bridge over a ditch near the [illegible] in Dearborn. The petitioners have [illegible] and [illegible] the [illegible] and the [illegible] and the [illegible] of the [illegible] Item was taken judgment.

At the October Term 1913 [illegible] by a majority vote. The [illegible] the majority was [illegible] who was [illegible] majority. [illegible] of July 19, 1914. [illegible] court [illegible] and the [illegible] In order [illegible] successor to John Tarkey [illegible] cannot be [illegible] of the board [illegible] than [illegible] every [illegible] way by [illegible] it will [illegible]

the judgment f this court but will endeavor to secure a final decision by the Supreme Court. We therefore conclude that the interests of the parties will be best served by avoiding fu ther delay in this court by affirming the judgment by a divided court. Binder v Langhorst, 139 Ill. App. 493; P. C. C. & St. L. Ry. Co. 144 Ill. App. 293, and 242 Ill. 178, 184.

The jdugment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

1227

Gen. No. 6172- October Term, 1913- Abstract No. 60-

Filed Dec. 27, 1913-

April 9 - 1914
R. H. Lindley

T.U.Fox.,
Appellee-

vs. ; Appeal from Circuit Court Nelson County-

Chicago & Alton R.R.Co.,
Appellant.

188 I.A. 11

MCBRIDE, J.-

Appellee brought suit against appellant in an action on the case to recover damages for failure to furnish cars for the shipment of corn from appellee's elevator at Sinclair, Ill., during the months of August and September, 1910, . Judgment was rendered against appellant on the verdict of the jury assessing appellee's damages at $358.50-

Sinclair is a small station, having only about five families On August 12th, 1910., appellee had 9,700 bushels of corn and 500 bushels of wheat to ship and notified appellant's agent of that fact and ordered cars with grain doors in which to transport said grain. Not receiving any cars, appellee requested the agent repeatedly to furnish the cars, and finally on August 18th he wrote to the General Freight Agent of appellant by letters for cars. The evidence tends to show that when the first cars were furnished they were not equipped with grain doors and could not be used. The first cars equipped with grain doors were furnished ~~September~~ September 5th and were billed out September 7th- Other cars were furnished from time to time and the last car was billed out October 1st- The loss on the cars of wheat was not included in controversy. Appellee failed to sell his corn in E. St. Louis, owing to the delay in getting the cars, claiming a loss of 7 cents per bushel on the corn on account of the decline of the market and therefor. The jury allowed about one-half of this amount.

It is claimed by appellant that it was the duty of appellee to have lessened the loss by furnishing the grain doors himself.

Appellee had no lumber with which to make the doors and there was no lumberyard at Sinclair, but it is urged that he might have ordered lumber from the City of Jacksonville and made them.

No such duty involved upon appellee. It was the duty of appellant to furnish cars suitable for the transportation of the commodity for which they were ordered. It is obvious that grain cannot be shipped in cars without doors. There is more or less conflict in the evidence in regard to the delay in the furnishing of these cars, but it was for the jury to reconcile this and its verdict on that issue is not manifestly against the weight of the evidence.

Complaint is made of the giving of appellee's first instruction. This, as modified by the court, fixes appellee's damages "at the difference, if any, between the market price at Sinclair, of such ~~differences if any between the market price~~ grain, at the time when said cars should have been furnished, and the market price when such cars were actually furnished".

Appellant's 7th given instruction announces the same measure of damages, and hence it cannot complain. Neither instruction announces the correct measure of damages, as the market price should not have been confined to that prevailing at the point of shipment. Appellee had a right to select his market and ship his grain to any point he desired and the damages should have been fixed with reference to the market price at the place where it was actually shipped, viz., E. St. Louis. The instruction was more favorable to appellant than to appellee.

What we have heretofore held in regard to the duty of appellant to furnish cars equipped with grain doors disposes of the alleged errors in the giving of appellee's fourth and fifth instructions and in refusing appellant's second and third instructions.

The judgment of the circuit court is affirmed.

A F F I R M E D.

1913

C. D. Myers
J.

1232

Gen. No. 6087. October Term, 1913- Agenda No. 65-

Filed May 5, 1914-

The People of the State of Illinois,
Defendant in Error-

vs. ; Error to the County Court of Champaign.

Charles Carter.,
Plaintiff in Error-

188 I.A. 22

Thompson, P.J.

The states attorney of Champaign county filed an information of twenty counts in the county court charging Charles Carter with selling intoxicating liquor in the Town of Champaign in said county while the same was anti-saloon territory. There was a trial before a jury and the defendant was found guilty on the first twelve counts. Motions for a new trial and in arrest of judgment were overruled and a judgment imposing a fine and imprisonment was duly enteredon said verdict. The defendant has sued out a writ of error to review that judgment.

After the plaintiff in error had entered a plea of not guilty he entered a motion for a rule on the people to file a bill of particulars and in support of the motion filed an affidavit that he had a complete defence to the case on the merits and that he was unable to properly prepare his defence without a bill of particulars. The court overruled the motion and plaintiff in error assigns error on that ruling. The only difference between the various counts is in the date on which the sales are alleged to have been made. The date alleged is in no way material provided the averments and the proof bring the offence within the period of the statute of limitation. A defendant is not entitled to a bill of particulars as a matter of right (People vs. Poindexter, 245 Ill., 62)., but when it is made to appear that the defendant cannot properly prepare his defence without a bill of particulars the states attorney should be required to furnish one. The rule is that the granting of a bill of particulars is within the sound discretion of the court. (People vs. Hall, 242 Ill., 284; People vs. DeBois, 200 Ill. 167).

In this case the affidavit stated that the defendant was not guilty and that he could not prepare his defence without a bill of particulars. The law presumes the defendant is innocent before the trial, and he was before entering on the trial, entitled to some information as to the charges against him that he might prepare his defence.

The record shows that "among other" questions, asked a juror on his preliminary examination, one informed him that the law presumes that the defendant is not guilty up to the time the jury arrives at a verdict and then asked the juror, "will you do that"? It is insisted that the court erred in sustaining an objection to the question. The question is informal as it is the presumption of innocence with which the law clothes or accompanies a defendant until verdict That is the only question in the record that was asked the juror and the record does not show but that the question had been answered by the juror in reply to other questions, on his examination, hence it does not appear that the ruling was erroneous.

It is insisted that the prosecution did not prove that the Town of Champaign was anti-saloon territory. The people introduced in evidence the record kept by the clerk of the Town of Champaign showing that at the township election held in the Spring of 1908, the question shall this town become anti-saloon territory was voted upon. The record gives the number of votes cast for and against the proposition and shows that there was a majority of five in favor of the town becoming anti-saloon territory. In 1910, and again 1912, the question shall the town continue to be anti-saloon territory was voted upon. The record shows the number of votes cast in each precinct on the proposition submitted and that in 1910, there was a majority of 357 votes in favor of the town remaining anti-saloon territory, and that in 1912, there was a majority of 479 votes in favor of the town remaining anti-saloon territory. The returns in the poll books of the different precincts were also offered in evidence and verify the accuracy of the record made by the clerk.

The evidence shows beyond a doubt that the town of Champaign was anti saloon territory at the time alleged in the information.

Thomas Hagan, a witness who runs a transfer business, and who had neither delivered anything to the defendant's place of business nor seen anything delivered there was permitted to testify over objection that his driver had delivered Terre Haute beer at the defendants place of business. This evidence was what his driver told him he had delivered. The objection should have been sustained to this evidence, since it was hearsay.

The defendant in error made proof concerning the acts of the plaintiff in error by two detectives named Armstrong. The elder Armstrong testified that he became a detective in September, 1911. The plaintiff in error in cross examination sought to show where the witness had resided and what had been his occupation before he became a detective and he replied that he had been a preacher and gave his place of residence as far back as 1896, the court sustained objections to further cross examination as to where he had lived and what had been his occupation. The cross examination of the witness in that line was a matter within the reasonable discretion of the court.

A witness named Hill testified that he had only been in Champaign a week before the trial, nothing further was asked of him. On cross-examination the witness answered that he had been promised money for testifying in the case. He was then asked if he had not been offered $100. and more for testifying in the case if the defendant was convicted. An objection to the question was sustained. The witness had not testified to anything in the case and there was no error in sustaining the objection.

The defendant did not testify in his own behalf but in argument to the jury, counsel for the people told the jury that "Carter has a right to prove his innocence if he wants to". This was an indirect reference to the fact that the defendant had the right to testify in his own defence and such conduct on the part of counsel is unprofessional and prejudicial. Miller vs. People, 216 Ill. 509.

Plaintiff in error contends that the court erred in giving the people's ninth and tenth instructions. The ninth is a copy of that part of Section 17 of the Local Option Act that prescribes the effect of the issuance of an internal revenue special tax stamp. The tenth informs the jury that prima facie evidence is evidence sufficient to establish a fact unless that evidence is rebutted. It is not error to give an instruction in the language of the statute. Donk Bros. Coal and Coke Co., vs. Peton, 192 Ill. 41. The tenth simply tells the jury the meaning and effect of the prhase prima facie evidence.

The fourteenth and fifteenth instructions given at the request of defendant in error refer to the detectives who had testified in the case and then tell the jury that they should not "be prejudiced to the extent of disbelieving such witnesses simply on account of such facts". These instructions are erroneous and subject to criticism for the reason they are argumentative and refer to and direct the attention of the jury to the evidence of particular witnesses. (People vs. Whalen, 101 Ill., App. 16). The nineteenth instruction given at the request of plaintiff in error refers to the evidence of the detectives and is vicious in that it tells the jury that the evidence of private detectives should be received with care and caution. People vs. Gardt, 258 Ill. 468; Hronek vs. People, 134 Ill., 139; People vs. Newbold, 260 Ill., 196.

The court refused to give the following instruction asked by plaintiff in error. "The jury are instructed as follows;-

The jury in a criminal case are, by the statute of Illinois, made judges of the law and evidence; and under these statutes it is the duty of the jury, after hearing the arguments of the counsel and the instructions of the court, to act upon the law and facts, according to their best judgment of such law and such facts."

This instruction states the law in criminal cases as pronounced by the Statute Sec. 431 of the Criminal Code. The court might have modified it by adding the judicial limitation that has been given to that section, "if the jury can say upon their oaths that they know the law better than the court". (Juritich vs. People, 223 Ill.

484.) but- it was error to refuse the instruction. For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and Remanded.

Mrs. G. Sturgis

Gen. No. 6123. October Term, 1913- Ag. No. 28-

Filed May 5, 1914-

E.L.Scott and W.F. Gaumer,
Appellants.,

VS. ; Appeal from Edgar.

J. Ogden O'Hair.,
Appellee-

188 I.A. 26

Thompson, P.J.

This is an action in assumpsit ~~xxxx~~ begun by plaintiffs against the defendant to recover commissions for services claimed to have been performed for the defendant by plaintiffs as real estate agents. The declaration consists of the common counts with which the plaintiffs filed a bill of particulars:- "To commissions in assisting in the exchange of lands of defendant in Edgar County, Illinois, for the lands in the State of Arkansas, and cash $2,500". The jury returned a verdict for plaintiffs for $50. on which judgment was rendered and plaintiffs appeal.

The only question seriously argued on behalf of appellants is that the verdict is contrary to the weight of the evidence

The evidence shows that appellants are real estate agents dealing in lands in Mississippi and Arkansas, with an office in Paris, Illinois. Appellants acted with a Mr. Price, of W.M. Price & Co., who are real estate agents in Stuttgart, Arkansas. The appellee resided on a farm of 381 acres, ten miles south west of Paris, Illinois. In the Spring of 1911, Scott, one of appellants, requested appellee to go to Arkansas to look at lands that appellants had for sale and proposedto pay appellee's railroad fare and other expenses if he would take the trip. Appellee accepted the offer and went to look at the land Scott had for sale but did not buy the land There were several conversations between the parties after that time in which appellants sought to sell land in the south to appellee. In December, 1912, appellants with one Burton, a brother-in-law of Scott, and who also was a real estate agent with an

office in Urbana and dealt in Arkansas lands, again went to appellee's residence and solicited him to go to Arkansas to see land owned by Price & Co. Appellee did not desire to go. Appellants then went to Thomas Frazier, a cousin and neighbor of appellee's, and offered to pay his expenses if he would go to Arkansas and get appellee to go with him. Frazier got appellee to promise to go, and a few days thereafter Scott went with an automobile for appellee and Frazier, and the three with Burton went to Arkansas and looked at the Price lands, which did not suit appellee. Price then showed appellee 731 acres of land farmed by one Caveen. After their return to Illinois, Burton, Caveen and Scott together went to appellee's farm where a contract was made for the exchange of appellee's farm for the Caveen land and $44,000. cash.

The evidence tends to show that appellants were working with Burton and Price to make a sale to appellee of south western lands and that they were not working for appellee. Appellee testified and insists that appellants were not his agents. There is evidence that while in Arkansas, appellee asked Burton if he would charge him if they made a deal, and Burton said no, that he would get his pay from Price, and that he would pay appellants if a commission had to be paid. Scott had left Stuttgart, before this and on appellee's return to Illinois, appellee with Frazier went immediately to Gamer's house and asked him if a trade should be made whether appellants would expect compensation and Gamer replied, "no not unless you are a mind to give it to us". This however is denied by Gamer who says he told him they would charge the customary commission. This is denied by appellee and Frazier. There is evidence that Scott agreed to pay one Hutchinson, $200. if he would get appellee and his wife to sign a contract extending the time for carrying out the contract. The evidence also tends very strongly to show that in the exchange of these lands and when the contract was signed, appellants were acting in the interest of the Arkansas parties and not of appellee. If they were acting in the interest of the Arkansas parties and not for appellee then they are not entitled to recover anything from the appellee.

Appellants argue that they are either entitled to a two per cent commission on the amount involved or they are not entitled to anything.

There is evidence in the case on the part of appellants that the trade for some reason fell through, and after that Scott stated that he was sorry it idn't go through as he was out considerable for expenses and appellee replied that he would pay something on it some day. The jury may have awarded the amount of the verdict for expenses incurred. A new trial for inadequacy of damages will not be allowed on the motion of the prevailing party when, in the judgment of the court, the verdict should have been against him. Lovet vs. City of Chicago, 35 Ill. App. 570; O'Malley vs. Chicago City Ry. Co., 30 Ill., App. 309; 29 C.Y.C. 847; Note to Toledo R. & L. Co., vs. Mason, 28 L.R.A. (N.S.) 130. If the trial judge had not believed that the appellants were not entitled to recover under the evidence he would have granted a new trial and we cannot say he erred in refusing a new trial.

Appellants state that the court erred in giving the fifth and eighth instructions given at the request of the appellee for the reason there is no evidence in the record on which to base them. These instructions in effect told the jury that if they believed from the evidence that appellants were acting as the agents of the Arkansas parties in procuring an exchange of real estate without disclosing that fact to appellee then appellants were not entitled to recover. The preponderance of the evidence tends to show that appellants primarily were endeavoring to sell Arkansas land to appellee and the trade of appellee's land was only an incident to the sale of the Arkansas land. There was no error in the instructions. Finding no error in the case the judgment is affirmed.

Affirmed-

Mr. Justice Scholfield took no part in the decision in this case.

H. B. Schneefield

Filed May 5 - 1914 -

Gen. No. 6131 October Term, 1913. Ag. 35

R. H. Arnold -

John Price, Appellee)
)
vs.) Appeal from Montgomery
)
The Clover Leaf Coal Mining)
Company, Appellant,)

June - 5 - 1914 -

188 I.A. 27

Opinion by Thompson, P. J.

Appellee recovered a judgment of $1,500 for personal injuries, which he sustained on June 25, 1912, while working as a coal miner in the mine of appellant.

The declaration contains three counts. The first count avers the enactment of the Compensation Act approved June 10, 1911; (Jur Rd § 449 Ed 1909) that the appellant had elected not to provide and pay compensation according to the provisions of said act, and that appellant thereby was deprived of the common law defence of assumed risk, fellow servant and contributory negligence, except that contributory negligence of an employe shall be considered in reduction of damages; that the appellee had elected to accept the provisions of said act which entitled him to recover for the injuries sustained; that while the appellee was engaged as a miner in a certain cross cut between certain rooms, a large piece of slate, which had been hanging in the roof for to-wit a week, the condition of which was or by the exercise of ordinary care would have been known to appellant, without warning fell upon and injured appellee, etc.

The second count contains the further averment that it was the duty of appellant to use reasonable care to furnish the appellee a safe place to work, but that disregarding its duty it negligently caused appellee to work in said cross cut, which was not a reasonably safe place as there was a large, loose and dangerous rock hanging over where appellee passed and was employed the condition of which, by the exercise of due care, was or could have been known to appellant.

The third count avers that appellant was operating a coal mine and in said coal mine was a certain cross cut where appellee was required to pass and work. It pleads the provisions of Section 21, of the Miners Act of 1911, (J-a ¶ 749) concerning mine examiners and avers that in said cross cut, where appellee was required to work, was a dangerous roof and that the mine examiner wilfully failed to place a conspicious mark thereat and failed to take up appellee's entrance check, and permitted appellee to enter the mine and to work during regular working hours under said dangerous roof, and while appellee was so employed said dangerous rock fell on him etc. A demurrer which is general and special was overruled after which appellant filed a plea of not guilty.

The appellant moved for a rule on appellee to elect on which count he would rely for a recovery, this motion was overruled. At the close of the evidence appellee requested the court to give instructions directing the jury to find the defendant not guilty on each count. These were refused.

The appellant has assigned for error and contends that the court erred (1) in overruling the demurrer, (2) in refusing to require appellee to elect on which counts he would ask a recovery, (3) in refusing to direct a verdict of not guilty, (4) that the judgment is contrary to the evidence and excessive, and (5) in the giving of certain instructions.

The demurrer for special causes states with other reasons that the Compensation Act is unconstitutional and invalid, and that it is not averred that the appellee gave notice that he had elected to accept the provisions of the Compensation Act.

The rule is well settled in this state that where a party to an action desires to have an order of the court overruling a demurrer, reviewed in a higher court he must abide by the demurrer. By pleading over the demurrer is waived. Heimberger vs. Elliot Switch Co. 245 Ill.448; C. & A. R. R. Co. vs. Clauson, 173 Ill. 100, and cases cited. Even if the demurrer

had not been waived by pleading over, the appellate court is without jurisdiction or authority to pass on constitutional questions and the appellant by appealing to this court and submitting the cause on errors assigned, over some of which this court has jurisdiction, has waived all constitutional questions. Luken vs. L. S. & M. S.Ry. Co. 248 Ill.377; P. C. C. & St.L.Ry.Co. vs.Chicago, 242 Ill.178; People vs. Maushalter, 149 Ill.App.399. For the foregoing reasons, the major part of appellants brief and argument should have been addressed to the Supreme Court on an appeal to that court.

Regarding the contention that the court refused to require the appellee to elect on which counts of the declaration he would ask a recovery, neither the motion, the ruling of the court, nor any exception thereto are preserved in the bill of exceptions. Section 81 of the Practice Act provides that a formal exception is not necessary to save for review any question submitted to the court for a ruling thereon during the progress of any trial. This provision of the statute has no application to motions made preliminary to the trial such as motions for a continuance, or the motion in this case to require the appellee to elect; rulings on motions preliminary to a trial, which are not a part of a common law record proper, must be preserved by a bill of exceptions. C. & E. I. R. R. Co. vs.Goyette, 133 Ill.21. Appellant contends that there was a misjoinder of cause of action in the several counts of the declaration. If the ruling of the court on the motion to require an election by appellee had been properly preserved for review, still there was no error in the ruling for the reason that all the counts were based on the same state of facts. If appellant is liable to appellee in a suit at law either under Section 21 of the Miners Act or in an action at law as modified by other provisions of the statute, the appellee should not be required to bring separate actions based on the same facts. Marquette Coal Co. vs. Diele, 208 Ill. 116.

The evidence shows that the appellee was a miner fifty-two years of age working for appellant in a cross cut between two rooms loading coal into pit cars and earning three dollars per day; that on April 25, 1912, while at work, a rock about six feet by twelve and six inches thick, fell from the roof over where appellee was working, striking him and breaking both bones in his right leg below the knee, tearing the ligaments loose on the inner side of the left ankle and injuring his back. Appellee was treated by a physician about two months; the physician's bill for treating him was $100. Appellee was confined to his bed about two months while under the care of the physician, and to his home about three months; he used crutches until March 1913, and at the time of the trial in April, 1913, was still suffering from the injuries.

The evidence further shows that appellant had declined to accept the provisions of the Compensation Act, and appellee testified that he had neither sent any notice to the Bureau of State Labor Statistics nor given a notice of any kind to his employer that he would not accept the provisions of the act.

The testimony of the mine examiner is that he examined the roof of this cross entry the night before the morning of the accident and found it sound and safe; that he marked with chalk on the roof of the cross entry the time of the examination, and before the men went to work in the morning made a record of his examination of the mine but no record concerning this particular entry in the book kept for that purpose outside the engine house, where the men in passing to work could examine it. There is no evidence tending to show that the appellee sounded and examined the roof of his working place before commencing work the day he was injured, but he testified that before starting to work he saw the chalk mark made by the mine examiner the proceeding night.

It is argued that the court erred in refusing to direct a verdict for the appellant upon each count of the declaration. The first count avers that appellee, an employe of appellant,

in its coal mine was injured in the course of his employment by a rock falling upon him and pleads the Compensation Act of 1911, the provisions of which appellant had refused to accept and thereby had waived the defences of assumed risk, fellow servant and contributory negligence, except that contributory negligence shall be considered in reducing the amount of damages. This count neither avers any duty due from appellant to appellee nor that appellant failed to perform any duty it owed to appellee; it avers neither negligence nor carelessness on the part of appellant. The averment simply is that appellee was injured in the service of appellant by a rock falling upon him. It would have been a good count under the compensation act, if appellant had not elected not to pay compensation as therein provided. The court should have given the peremptory instruction as to the first count.

The second count contains the averments of the first count with the further averment that appellant was negligent in causing appellee to work in said cross cut which was not a reasonably safe place to work, in that there was a dangerous rock which was, or with due care would have been known to appellant.

Under the provisions of the act, if the employer has elected not to accept its provisions and pay the compensation therein provided to an employe who has elected to accept the provisions of the act, then the employer "shall not escape liability for injuries sustained by such employe arising out of and in the course of his employment," because of the common law defences of assumed risk, negligence of a fellow servant or contributory negligence of the employe proximately causing the injury.

The statute also contains a provision that in the event the employer elects to pay compensation as provided in the act--that is has not refused to accept its provisions--then every employe under such employer shall be deemed to have accepted and be bound by its provisions, unless the employe shall file a notice with the

State Bureau of Labor Statistics that he elects not to accept its provisions, in which event the employer shall not be deprived of any of his common law or statutory defences. The provisions of the act are automatically accepted by both parties, by the employer not filing an election declaring his refusal to accept its provisions.

The act does not contain any further provision as to the effect, where the employer has filed an election not to accept its provisions and the employe has accepted its provisions by not filing an election not to accept it.

Section 10 of the act provides that "Any question of law or fact arising in regard to the application of this law shall be determined either by agreement of the parties or by arbitration as herein provided." It then provides that in case or disagreement each party shall elect an arbitrator, and the judge of the county court or other court of competent jurisdiction shall appoint the third, and for the procedure by such board of arbitrators and for an appeal from its decision. It is manifest that if either of the parties has elected not to accept its provisions there can be no arbitration on behalf of a party or against a party who has refused to accept the provisions of the act.

The third section of the act is concerning the employe's right to recover damages and provides that "no common law or statutory right to recover damages for injury or death sustained by any employe while engaged in the line of his duty as such employe other than the compensation herein provided shall be available to any employe who has accepted the provisions of this act." provided if the injury was caused by the intentional omission of the employer, to comply with statutory safety regulations nothing in this act shall affect the civil liability of the employer. We conclude that the provisions of section three and ten can only apply to cases where both parties have accepted the provisions of the act, and that where the employer has refused to accept its provisions, he thereby waives his defences of assumed risk, fellow

servant and contributory negligence, and that the right to maintain a suit a law remains to an employe, who has not refused to accept its provisions, for anyinjuries received by him but freed from said defences, if it is averred that the injuries were caused by the negligence of the employer and the evidence sustains the declaration subject only to the provision that contributory negligence shall be considered by the jury in reducing the amount of damages.

The evidence is that the coal had been blasted down several days, and that there had been no shot firing in that part of the mine for three or four days. There was but one mine examiner to examine the entries, roadways, cross cuts, passageways and about sixty rooms. This work he did between nine o'clock in the evening and four-thirty the next morning; the rock fell from the roof injuring appellee about ten o'clock the next morning. The evidence of the examiner showed his method of examination and the extent of it. It was a question for the jury to say from all the evidence and circumstances in evidence whether the examination was of the thorough kind contemplated by the statute or merely perfunctory and whether the roof at that time was safe or was in fact dangerous, Olson vs. Kelly Coal Co. 236 Ill.502; Aetitus vs.Spring Valley Coal Co. 246 Ill.32. There was evidence tending to prove each count and there was no error in refusing to give the peremptory instructions asked as to the second and third counts.

The first instruction given at the request of appellee, in part is: "If the jury find that the evidence bearing upon the plaintiff's case as alleged in his declaration, or in either count thereof, preponderates in his favor although but slightly, it will be sufficient to warrant the jury in finding issues for the plaintiff."

The second is:-"The Court instructs the jury that Section 1 of 'An Act to promote the general welfare of the people of this state, by providing compensation for accidental injuries or death suffered in the course of employment', approved June 10,1911, in force May 1, 1912, 'Provides that any employer covered by the

provisions of this act in this state may elect to provide and pay compensation for injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided. If, however, any such employer shall elect not to provide and pay the compensation to any employee who has elected to accept the provisions of this Act, according to the provisions of this Act, he shall not escape liability for injuries sustained by such employee arising out of and in the course of his employment because (1), the employee assumed the risks of the employer's business; (2), the injury or death was caused in whole or in part by the negligence of a fellow servant; (3), the injury or death was proximately caused by the contributory negligence of the employee but such negligence shall be considered by the jury in reducing the amount of damages."

The fourth instruction is a literal quotation of paragraph (b) of Section 21 of the Mines and Miners Act.

It is contended that the giving of the second and fourth instructions was error for the reason no reference is made therein to the evidence, and that there are some portions thereof not applicable to the case.

Neither the second nor fourth instruction directs a verdict or is peremptory in form. It was said in Donk Bros. Coal & Coke Co. vs.Peton, 192 Ill.41, where the same objection was made, "The instruction was couched in almost the exact language of the statute and where an instruction is given in the language of the statute, it must be regarded as sufficient because laying down the law in the words of the law itself ought not to be pronounced error." In Mertens vs Southern Coal Co. 235 Ill.545, it was said, "The first instruction offered on behalf of appellee sets forth all the duties of the mine examiner specified in Section 18 of the Mines and Miners Act, while the evidence only

showed a violation of certaion provisions of said eection." The court held the instruction proper and that there was no error in giving it. The firstninstruction requested by appellee was clearly erroneous, for the reason that the first count was proved by simply showing that appellee was injured in the service of appellant in the course of his employment, irrespective of whether appellant was negligent in any way. All that part of the second instruction preceding the portion that tells the jury the penalties imposed on an employer for refusing to accept the compensation act was misleading in informing the jury that an employee has the right to recover for any injury received in the course of his employment under the compensation act, the giving of the second instruction was reversible error while the first count remained in the case for the consideration of the jury. Concerning the fourth instruction while parts of it had no application to the case, it was not misleading and there was no error in giving it.

The propriety of some other instructions is questioned but we find no reversible error in them, and we do not deem it necessary to discuss them at length.

The judgment is reversed for the errors indicated and the cause remanded.

Reversed and Remanded.

C. McBride-J —

Gen. No. 6137 October Term 1913. Ag. 38

Filed May 5, 1914.

John M. Jones, Appellee,)
vs.) Appeal from Champaign.
August Minks, Appellant,)

Opinion by Thompson, P. J.

188 I.A. 45

A judgment by confession for $2,735.07 was on November 27, 1912, entered in vacation in the office of the circuit clerk of Champaign county on six judgment notes executed by August Minks. The notes were all payable to John M. Jones and dated May 1, 1912; three of the notes are for the principal sum of $300 each; two are for $700 each and one is for $118.81. At the following January term of court, on motion of defendant the judgment was opened up, and leave given the defendant to plead to the declaration. The defendant filed four pleas of failure of consideration which the defendant in his argument states are immaterial to the issues before this court. Upon a trial before a jury, after the defendant had practically closed his evidence, he obtained leave to file two additional pleas. The first additional plea avers a failure of consideration as to all the notes except the sixth which is for the sum of $118.81. The second additional plea avers a failure of consideration as to $1,700, the part of the notes which was given for the purchase of a gasoline tractor. At the close of defendant's evidence the court excluded it and instructed the jury to find a verdict in favor of the plaintiff for the full amount of all the notes.

Thereupon an order was entered vacating the order opening up the judgment, and it was further ordered that the original judgment remain in full force. The defendant appeals.

The only questions raised on this appeal concern the sustaining of an objection to certain evidence offered by defendant and the giving of the peremptory instruction. The evidence discloses that appellee Jones is a local agent of the International Harvester Company at Dewey, in Champaign county. Appellant is a tenant farmer living about three miles from Dewey. In March 1911, two agents of

the International Harvester Company, named Newman and Lynch, called upon appellant to sell him a gasoline tractor and plow. Appellant had an Avery 22 horse power steam traction engine and shortly before that time had entered into a contract with another company for a gasoline tractor. The evidence further is that the agents of the Harvester company induced appellant to cancel the contract with the other company and represented to him that the international gasoline tractor was a 45 horse power engine and had the same power as a 28 horse power steam engine; that it used a gallon of gasoline per horse power per day of ten hours; that it would pull eight plows plowing ten inches deep and was better than a steam engine for running a threshing machine. Appellant went to Chicago with Newman to the plant of the Harvester Company and was shown one of the engines. A few days thereafter, Newman acting for the company, a contract was signed at Dewey for the purchase of a tractor and plow. The price of the tractor was $2,700. In the transaction the Avery traction engine was taken by the Harvester Company at $1,000 and notes to the amount of $1,700 were given for the balance on the tractor; the other notes were given for the plow and other things purchased. The order for the machinery directs that it be "consigned to the care of J. M. Jones, agent at Dewey." The tractor was delivered by the vendor to appellant at his farm and the notes were given at Jones place of business where he was shown the contract and was asked by Newman if it was all right to take the notes in his name and upon his replying that it was, they were so taken. Jones never presented or demanded payment of the notes from appellant and before the suit was brought Newman, the representative of the Harvester Company, called upon appellant and demanded payment of the notes. Under such circumstances it would appear that Jones was the trustee for the Harvester Company and having notice of the contract he was not an innocent purchaser.

The contract for the purchase of the tractor is in writing and contains a clause that the appellant purchases the same "subject to all conditions of agreement and warranty printed on the back of this order and made a part hereof". The warranty has several

lengthy and involved conditions attached to it and provides among other things -

"INTERNATIONAL HARVESTER COMPANY OF AMERICA (Incorporated) hereby warrants said thresher, attachments and engine to be well made, of good material, and durable with proper care, and to do good work if properly operated by competent persons, with sufficient power, and the printed rules and directions of the manufacturer intelligently followed. If, after three days' trial by the purchaser said property shall fail to fulfill the warranty, written notice thereof shall at once be given to said company at Harvester building Chicago, Illinois, and also to the agent through whom the same was purchased, stating wherein it fails to fulfill the warranty, and reasonable time shall be allowed said company to send a competent man to remedy the difficulty, the purchaser rendering necessary and friendly assistance. Said company reserves the right to replace any defective parts, and, if then the machinery cannot be made to fulfill the warranty, the part that fails is to be returned by the purchaser, free of charge to the place where received and the company notified thereof, and, at the company's option, another substitued therefor that shall fill the warranty, or the notes and money for such part immediately returned, or the amount credited on the notes that have been given, and no further claim shall be made on said company.

Failure to make such trial, or to give notice as herein provided, shall be conclusive evidence of the fulfillment of the warranty, and the company shall be released from all liability" and "that no representations made by any person as an inducement to give and execute the within order shall bind the company", and "This express warranty excludes all implied warranties * * *".

Appellant contends and by his pleas avers that the agents of the Harvester Company fraudulently and deceitfully made the following untruthful representations to him as an inducement to him to purchase its tractor. (1) That the up-keep and maintenance of the tractor was less than the up-keep and maintenance of a steam engine of like power; (2) that the gasoline tractor would do the

same work a steam tractor would do fully as satisfactorily and at less cost; (3) that the gasoline engine was more easily handled than a steam engine; (4) that the gasoline tractor would operate on a gallon of gasoline per horse power per day of ten hours; (5) that the gasoline tractor would pull eight plows plowing ten inches deep and would also pull a harrow and drag after it, and (6) that the gasoline tractor would operate a sheller and separator as satisfactorily as would a steam traction engine.

The pleas are in the nature of a plea of fraud and deceit in that appellant was induced to execute the contract by false and fraudulent representations as to the nature and value of the tractor but do not aver that the untruthful representations were knowingly made. The pleas were not demurred to and the trial proceeded as if issues were joined on them. In Allen vs. Hart, 72 Ill.104, it is said: "But it is not indispensable to the right to rescind, the party guilty of making the misrepresentation knew it to be false, or whether he was ignorant of the fact stated provided it was material, and the other party had a right to rely upon it, did so and was deceived. x x x."

The appellee's contention is that the contract of warranty is in writing and that because it provided that the express warranty excludes all implied warranties, and that no representations made by any person as an inducement to execute the contract shall bind the company and that theretofore the contract having been reduced to writing, no oral evidence could be offered as to what occurred prior to the making of the contract.

The suit is to recover on notes given for the machinery ordered under the contract and not upon the original contract. Under the Negotiable Instrument Act "it is competent to show that the defendant was induced to execute the instrument by false and fraudulent representations, as that is one mode of showing a failure of consideration * * * and for this purpose it may be shown that the consideration expressed in the instrument is not

the real consideration which induced its execution but that it was in fact entirely different. G. W. Ins. Co. vs. Rees, 29 Ill.272. In that case speaking of the statute referred to, and admitting parol evidence to explain the consideration it was said; 'it is impossible that this statute can be made effective in any other way than by receiving such proofs; and in receiving them the old rule that written contracts cannot be varied by parol, becomes, in all such cases ineffective'." Gage vs.Lewis, 68 Ill.604; White vs. Watkins, 23 Ill.482; Taft vs. Myerscough, 197 Ill 600. "If a person makes a distinct assertion of the quality or condition of the article sold, whether it amounts to a warranty or not, which he knows or should know is true with a view to induce another to buy and the other relies on and believes the assertion to be true, and relying thereon purchases, and damages ensue he may maintain an action for deceit." Ruff vs.Jarrett, 94 Ill.475; Thorne vs.Prentiss, 83 Ill.99. The existence of an express written warranty does not exclude a defence based on fraudulent misrepresentations inducing the sale Gage vs.Lewis, 'Supra.); Taft vs. Myerscough (supra); Mayer vs. Dean, 115 N. Y. 556; 35 C.Y.C380. The evidence shows that the Harvester Company is the manufacturer of the tractor and sold the tractor to appellant to be used for certain purposes. The manufacturer of machinery is presumed to know its capacity and adaptability for the purposes for which it is sold. Iroquois Furnace Co. vs.Wilkins Manuf. Co. 181 Ill.582. The plea being failure of consideration by reason of fraud and deceit, parol evidence to show the alleged fraud and deceit was properly admitted and should not have been excluded.

The evidence tends to show that the tractor rated as a 45 horse-power engine, did about the same amount of work as an 18 horse power steam engine, that would use a ton of coal a day costing $3. per ton, while the gasoline tractor used from 80 to 100 gallons of gasoline costing 15¢ a gallon every ten hours; that it would only pull six plows plowing five inches deep in place of eight plows plowing ten inches deep and that the engine constantly got out of order and had no brake on it. The written contract

warrants the "engine to nbe well made of good material, and durable with proper care and to do good work if properly operated by competent persons with sufficient power * * ". The engine was the power to operate the farming implements. The warranty appears to be very adroitly worded and avoids any mention of the power or its economy in the use of fuel, while the representations made to induce its purchase were that it was a 45 horse power engine; that it only used one gallon of gasoline per horse power for ten hours work and was better than a steam engine to operate a threshing machine.

While the evidence shows that appellant did much work with the tractor between the time it was delivered to him in May, and November when he finally notified Jones the agent of the company that he would not keep it, yet it tends to show that the tractor never worked satisfactorily; that it did not have the power represented by its manufacturer to induce its purchase and that it was ungovernable with a threshing machine for want of a brake. Appellant kept complaining to the agents of the Harvester Company that the tractor was not acceptable and men were sent at several different times by the company to try and fix it, and the evidence introduced by appellant tends to show further that they never succeeded in making it work right or do the work it was represented to do. The last man to try to fix it was Joel Maloney, who was one of the employes of the company that delivered the tractor to appellant and showed him how to run it. He came after fair time and took the engine to pieces. He found that it had to have some new parts and did not get it together again for a week, after which it was still unsatisfactory and in the course of three or four days broke down. Appellant then refused to have anything further to do with it and notified Jones that it was at the Company's disposal at the place where it had been delivered to appellant. We are of the opinion that there was

sufficient evidence in support of the additional pleas to require that it be submitted to a jury. If there was fraud in obtaining the contract, then appellant had the right to rescind the contract and return the tractor on the discovery of the fraud, and, if the contract was rightfully rescinded, there was a failure of consideration for the notes to that extent.

Appellant was asked if he believed and relied on the representations concerning the tractor, that he states were made to him by the parties who sold it. The agents were sales agents of the Harvester Company. The Harvester Company cannot by inserting the clause in the contract, that no representation made by any person shall bind the company relieve itself of any false and fraudulent statements, if any there were, made by its agents while in the line of their duty. The rule is that a party may testify whether he believed and relied on the alleged false and fraudulent representations made. Kearney v. Davis, 162 Ill.App. 37; Halderman vs. Schut, 109 Ill.App.254.

The judgment is reversed and the cause remanded for the error in giving the peremptory instruction.

Reversed and remanded.

Hon. L. Coleman

1233

Gen. No. 6146- October Term, 1913- A. No. 47-
Filed May 5, 1914-

Frank Whisman, Admr.,
Appellee-

VS. ; Appeal from McLean.

G.H.Small.,
Appellant.,

188 I.A. 61

Thompson, P.J.

This is a suit brought by Frank Whisman, administrator of Laura B. Whisman, deceased, against G.H.Small to recover damages for the death of Laura B. Whisman, the wife of Frank Whisman, averred to have been caused by mal practice of the defendant. The first count of the declaration avers that the defendant, a physician, on February 15, 1913, was called to attend Laura B. Whisman in her confinement and negligently infected the deceased at the time of the delivery of a child with erysipelas and thereby caused the death of the patient. The second count avers that the defendant did not exercise the degree of care commensurate with the standard of medical skill in the vicinity of Leroy, the residence of the deceased and did not make as many professional visits as the seriousness of the case required, and wilfully abandoned and refused to give further treatment on February 21, 1913, etc. A trial resulted in a verdict and judgment for plaintiff for $2,500., from which the defendant appeals.

The evidence shows that Mrs. Whisman was delivered of a child, at a farm house three and one half miles from LeRoy, on the night of February 15th, or early morning of Sunday the 16th , and that Mrs. Clara C. Buckles was the nurse who attended her and who called the physician to attend the patient. The court sustained an objectionto the appellant testifying to a conversation between the physician and the nurse when the physician first arrived at the house, held in an adjoining room to that occupied by the patient and which could have been heard by the patient, and to a conversation between the physician and the patient the second day after the child was born and in which Mrs. Buckles took part and concerning which Mrs. Buckles had testified.

The question of whether appellant was a competent witness to testify in his own behalf to either of these conversations testified to by Mrs. Buckles depends on whether either paragraph second, or paragraph fourth of section two of the Evidence Act renders him competent. Paragraph second is:- "When, in such action, suit or proceeding, any agent of the deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction".

Paragraph fourth is:- "When , in any such action, suit or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation".

The second paragraph permits a party to a suit to testify against an administrator to a conversation, when an agent of a deceased had testified concerning that conversation between the agent and such opposite party. The fourth paragraph permits a party to testify against an administrator when a witness, not an agent of the deceased personn, has testified to a conversation or admission by the party occurring before the death of the deceased in the absence of the deceased. "The presumption is that one offered as a witness is competent to testify, and the burden is therefore upon one who objects, to state and prove the grounds of his objections". Campbell vs. Campbell, 137 Ill. 466; Boyd vs. McDermott, 209 Ill. 596. Neither paragraph second or fourth permits a party in interest to testify to a conversation he may have had with the deceased, whether it was testified to by an agent of the deceased or by a disinterested witness, nor do they permit an adverse party to testify to

a conversation of such adverse party that occurred before the death in the presence of the deceased and which is testified to by a disinterested witness not an agent of the deceased.

Mrs. Buckles testified that part of her business was waiting on women in child birth and that she went to Mrs . Whisman's Saturday evening about six o'clock; that Mrs. Whisman was then well, but commenced to have labor pains about nine o'clock, and that she, Mrs. Buckles, called the physician and said "I think we are going to need you out here. I thought I would call to see if you are in town", - and I said, later on I will let you know and about half past ten she "again called appellant and said Mrs. Whisman was sick and wanted him to come". Mrs. Buckles was an agent of the deceased in calling the physician to attend Mrs. Whisman. After the physicians arrived the question argued is was the nurse an agent or simply an employe . It is difficult to define the distinction between principal and agent and master and servant. An agent has been said to be employed in a capacity superior to a servant and is clothed with greater discretion while a servant is bound to perform the service in the manner commanded by the master. (31 CYC. 1192). The record in this case disclosed that Mrs. Buckles was authorized to call the physician but beyond that Mrs. Buckles was a nurse to perform her duties under the direction of her employer and the attending physician. The court had to pass on the question of whether she was an employe only, or whether her employment was in the nature of an employment for service and agency combined on the evidence before it. We conclude that there was no error in the ruling of the court.

The patient appears to have been taken with severe pain about midnight Sunday. The appellant visited her on Monday and talked with the nurse about the condition of the patient on Tuesday, and visited her about noon Wednesday. The nurse testified that the patient was very sick Thursday morning and that she tried to call the appellant over the telephone that morning after the eight o-clock train had gone to Bloomington, and that appellant's wife told her appellant had gone to Bloomington and would not be back until

6 o'clock that evening; that after the trainex come in she called for appellant, and appellant's wife again answered the telephone and said he did not come in on the 6 o'clock train and he would not be in until ten. "I said whatever you do tell him to call Mrs. Buckles at Whisman's, I want to talk to him". , and that appellant did not call her. Appellee testified that he called appellant about six Friday morning and wanted him to come out but he said he had to go to Bloomington at eight, and that he would leave some medicine that appellee should go and get and that he went and got it; that appellant called him over the telephone about 3 or 4 o'clock Friday afternoon and enquired how the patient was and appellee said her temperature was not quite so high, and appellant said he was busy then and asked appellee to let him know later on how she was; that about 6 or 7 o'clock he again called appellant and asked him if he intended coming out, and that appellant said no; that appellee told appellant the patient's temperature was over 102, and appellant said that is not much fever and it was not necessary to come out and appellee told appellant "if you don't come you can count yourself out, we are going to have a doctor and he said all right and hung up".

The appellant testified to substantially the same conversation on Friday morning but with the addition that he said to appellee that he would come out immediately after the train came in at 1-30 and if appellee wanted him, to telephone his wife. Appellant testified that he was not called by any person Thursday, and that in the conversation at 4 o'clock Friday, appellee told him it was not necessary for him to come out. Appellant was asked if he learned from any one after his return on the 1-30 train Friday that they had called him and an objection was sustained to that question.

Mrs. Minnie Small, the wife of appellant, was asked concerning the conversations over the telephone with Mrs. Buckles and an objection was sustained to her testifying on the ground that she was the wife of appellant.

After the court had sustained an objection to Mrs. Small testifying, appellant made a motion to exclude the evidence of Mrs. Buckles as to the conversation with his wife and the court overruled the motion

The only ground on which the testimony of Mrs. Buckles concerning the conversation with Mrs. Small was competent was on the theory that Mrs. Small was the agent of her husband. There is no evidence in the record that Mrs. Small was the agent of her husband unless such agency may be presumed from her answering the telephone, and the evidence of appellant that ~~xxx~~ on Friday he told appellee "if he wanted him to telephone his wife". The record does not show whether the telephone was at ~~xx~~ the residence of appellant or at his office. That a physician may have a telephone in his residence does not of itself make the members of his family, who may answer a telephone call an agent of the physician. Unless the person answering the telephone was the agent of the physician ~~xxx xxxxxxxx~~ the evidence concerning this conversation was incompetent. We do not find any evidence in the record that Mrs. Small was the agent of her husband on Thursday when Mrs. Buckles says she talked to her on the telephone and it was error to overrule the motion to exclude the evidence of the nurse as to conversations with Mrs. Small. This evidence was very prejudicial in view of the second count of the declaration.

Section 5 of the Evidence Act provides: "in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all which cases the husband and wife may testify for or against each other, in the same manner as other parties may under the provisions of this act", provided nothing in this act shall be constructed to permit any husband or wife to testify to any admission or conversations of the other except in suits between them. Under this provision of the statute, if it was competent ~~xx~~ for Mrs. Buckles to testify to the conversation had with Mrs. Small, then Mrs. Small was a competent witness to testify to the same conversation. McDavid vs. Rork, 92 Ill. App. 482.

The judgment is reversed and the cause remanded.

Reversed and Remanded-

C. L. Myers —

Gen. No. 6158. October Term, 1913- Agenda No. 56-

Filed May 5, 1914-

Paul O. Moratz
Appellee

VS. ; Appeal from County Court of McLean

Maurice C. McCarthy,
Appellant-

Thompson, P.J.

Plaintiff began this suit before a justice of the peace to recover the amount due on an order for $77.67 given him by the defendant on a settlement of a building account. An appeal was taken to the county court. At the April term, 1913, of that court, one of the attorneys for defendant being absent from Bloomington, by agreement of counsel in open court a trial by jury was waived, and it was agreed that the case shouldbe tried at that term upon the return of the absent attorney. No trial was had that term. A week before the August term, the judge of the court had counsel called to the court room to set a trial docket for the approaching term, and the trial of this case was set for the third day of the term. On the day it was set for trial one of the attorneys for the defendant made a motion for a continuance, and filed in support of the motion an affidavit made by the attorney and the defendant that they had not had notice of the setting of the case for trial and that the defendant could not be ready for trial by 1-30 of that day because he did not know of the whereabouts of two witnesses, who were in the City of Bloomington, and because another witness was in Taylorville, and stating what the defendant expected to prove by said witnesses. The Court denied the motion for a continuance and offered to postpone the trial to 1-30 the next day, but counsel stated he could not be ready by that time; the court did postpone the trial to the following day. The next day counsel for defendant failing to appear the case was tried by a jury and a verdict returned in favor of plaintiff for $82.50 on which judgment was rendered.

Counsel for appellant have made a statement of the case but have not filed any brief or argument. It appears the defendant was in court when the motion for a continuance was made. The affidavit shows two of his witnesses were in Bloomington and one in Taylorville. No reason appears showing why defendant could not have been ready for trial the day the case was tried, if the defendant had used any diligence to procure the attendance of his witnesses even after the hearing was postponed to the following day. The judgment is affirmed.

A F F I R M E D.

H-H-Hall Co-J-

(1246)

Gen. No. 6169. October Term, 1913- Ag. No. 77-

Filed May 5, 1914-

The People of the State of Illinois,
ex rel. Stella Chaney.,
Appellee.

VS. ; Appeal from County Court of

Otis Preston, DeWitt-
Appellant-

188 I.A. 93

Thompson, P.J.

The relatrix, Stalla Chaney, an unmarried woman, on the 2nd of July, 1912, made a complaint in bastardy before a justice of the peace, that she was pregnant and that Otis Parker was the father of the child. The defendant was found to be the father of the bastard child of the relatrix. Judgment was entered on the verdict and the defendant appeals.

The evidence in this case is very conflicting and as the case must be reversed for errors of law we refrain from expressing any opinion on the weight of the evidence of the merits of the case.

It is insisted that the court erred in sustaining an objection to evidence offered to show the relations that it is claimed existed between the relatrix and other men. It was competent for the defendant to introduce evidence to show that the relatrix had intercourse with other men about the time she became pregnant, but such evidence must be limited to a period of time within which, in the course of nature, the child could have been begotten and the relatrix may on cross examination be asked whether she had intercourse with other men within such time. 2 Encyc. of Ev. 248; Holcomb vs. People, 79 Ill. 409; Hobson vs. People, 72 Ill. App. 436. The child was born July 24, 1912. The evidence shows that the period of gestation varies from 240 to 300 days and that this child was born 16 days before the usual period had elapsed. The evidence offered related to acts of the relatrix in February. The objection was properly sustained.

In the cross examination of the relatrix she was asked if

she had not testified to certain things at the preliminary examination before the justice, and on re-examination counsel for the people was permitted to ask her, over objection made, if she had not testified to other things before the justice that were not connected with the questions asked on the cross examination. The evidence on the re-examination should have been confined to such answers, if any, as were connected with and modified or explained the answers inquired about in the cross examination; it was not proper for her to testify concerning her evidence before the justice as original evidence on the trial in the county court.

The evidence shows that the relatrix had in April, 1908, procured a divorce under the name of Estella Luker. The defendant requested an instruction that if the jury believed the correct name of the relatrix was Estella Luker they should find the defendant not guilty. The court refused the instruction and defendant contends that this was error. The evidence shows that the relatrix went, - and was known under the name of Stella Chaney. She made the complaint ~~in xxxxxxxxxx~~ in the name by which she was known, the proof corresponded with the complaint and there was no error in refusing the instruction.

The appellant in several instructions requested the court to inform the jury that it was incumbent on the prosecution to prove the appellant guilty by a clear preponderance of the evidence before they could find him guilty. The court modified the instructions by striking out the word clear. A prosecution for bastardy is a civil proceeding and a preponderance of the evidence was all that the law requires to authorize a verdict of guilty.

In instructions given at the request of the people the jury were informed that a judgment of conviction, only meant that the defendant would be compelled to pay the mother for the use of the child $100. for the first year and fifty dollars for nine succeeding years, if the child lived that long. The jury had nothing to do with the result of the verdict and the instructions as to the effect of

a verdict of guilty were argumentative and improper and should not have been given. People vs. Welch, 143 Ill. App. 191.

In the final argument of the case, the attorney for the relatrix said among other things:- "Any man, in the strength of manhood, who will bring his old mother into the court room, that she may perjure herself for him is not fit to associate with decent people". "I don't believe when he walks down Chicken Row here, that the inhabitants would recognize him, any more than they would a cur dog". "Gentlemen of the jury, if a man could debauch a daughter of mine, as this man debauched this woman, there wouldn't be any jury to pass upon that question, because as sure as I am standing here I would kill him". Objections were made to the statements of counsel but the court made no ruling thereon. The last statement was especially inflamatory and prejudicial. It is highly improper for an attorney to tell the jury that he would take the law into his own hands and that a court would be unnecessary in such matters, if it was a member of his family that he thought had been wronged. It was urging the jury to regard their duty lightly and find the appellant guilty whether justified or not by the evidence and the law. An attorney,- an officer of the court, should not be permitted to make such appeals to the passions and prejudices of jurymen, and where the evidence is as conflicting as it is in the present case a verdict obtained by such inflamatory statements cannot be sustained. State vs. Proctor, 86 Ia. 698. The argument of counsel alone requires the reversal of the case. The judgment is reversed and the cause remanded.

Reversed and Remanded-

Fred E. Hill Co. J —

Gen. No. 6181. October Term, 1913. Agenda No. 86-

Filed May 5, 1914-

Frank K. Lemon,
Surviving Partner, etc.,
Defendant in Error.,

VS. ; Error to DeWitt.

Richard Snell,
Plaintiff in Error.

Opinion by Thompson, P. J.

This suit was begun by Richard A. Lemon and Frank K. Lemon, partners, to recover attorneys' fees from Richard Snell for services performed by plaintiffs in litigation concerning the estate of Thomas Snell deceased. After the suit was begun Richard A. Lemon, died and the suit was prosecuted in the name of Frank K. Lemon, surviving partner.

The claim of plaintiff is for $15,000. for services rendered in the contest of the will of Thomas Snell, in which suit plaintiff's were of attorneys for Richard Snell contestant, and for $5,500. for services rendered in the estate ~~of~~ for defendant as administrator after the suit to contest the will was terminated. A jury returned a verdict in favor in plaintiff for $1,750 on which judgment was rendered and the defendant prosecutes this writ of error to review the judgment.

Frank K. Lemon was called as a witness in his own behalf. The defendant was permitted to ask the witness some preliminary questions for the purpose of laying a foundation for an objection to any evidence being heard by the jury concerning the will contest. On this preliminary examination it was developed that plaintiffs on December 8, 1910, signed a receipt for $4,000. in full of attorneys fees in the case of Snell vs. Weldon and others. The defendant thereupon objected to any evidence concerning the services performed, or the value thereof, in that suit. The plaintiff was permitted to show that there were three trials of that case in the circuit court,

each of which extended over from two to three weeks, and two appeals to the Supreme Court. This witness testified that the value of the services rendered by plaintiffs ~~xxxxx~~ in that litigation was ~~$24~~ $25,000. He also testified that they had an express contract ~~xx~~ with the defendant for the payment of $7,500 . at the ~~xxxx~~ successful conclusion of that litigation or $1,000. at the end of it, if it was unsuccessful; that the contest ended in favor of Richard Snell , and that $3,500. had been paid to them before December 8, and that the receipt for the $4,000. was for the payment of the balance of the $7,500. Plaintiff was also permitted to prove over defendant's objection, by a number of attorneys that the value of such services was from $15,000. to $20,000. The objection to the evidence concerning the will contest and the value of such services should have been sustained for the reason the services were rendered under an express contract and there was no liability thereunder for the reason it had been fully paid by defendant.

Plaintiff was also permitted to prove, over objection, that after the payment of the $7,500. they had made a claim for further compensation for services in that litigation and that defendant had made an offer to give them $1,500. This was nothing more than an offer to make a donation. It was a promise to make a gift and there was no consideration for it; it was an attempt on the part of defendant to satisfy the plaintiffs and buy his peace. The court afterwards excluded all evidence concerning the will contest, the services rendered therein, the claim for further compensation and the offer to give $1,500; and gave a written instruction directing the jury to disregard all the evidence concerning those matters.

After the will contest was disposed of Richard Snell by his attorneys, Lemon & Lemon, E.J.Sweeney and Ingham and Ingham filed a petition in the county court for the revocation of the letters testamentary theretofore issued to Lincoln H. Weldon and for the appointment of petitioner as administrator. An order was entered revoking the letters testamentary and ordering letters of administration to Richard Snell,

which were issued to him. On the last day of the March Term, 1910, of the county court, an order was entered, that Weldon turn over to the administrator all the assets of the estate in his hands as such executor. As soon as the term of court at which the order was entered had expired, notice of the order was served upon Weldon. On April 5, Weldon filed a report of his account as executor ahd made a motion to vacate the order on him to turn over all the assets in his hands to the administrator. The county court denied the motion to vacate the order on the executor to turn over ~~in~~ all the assets to the administrator, and on motion of the administrator struck the report of~~the~~ Weldon from the files.

Weldon, the executor thereupon took threeappeals from the orders of the county court, (1) an appeal from the order directing him to turn over the assets to the administrator; (2) an appeal from the order denying the motion to vacate said order, and (3) an appeal fro the order~~striking~~ striking the report from the files.

On the hearing of these appeals in the circuit court, the court held that the order directing the executor to turn over the assets to the administrator was erroneous; that the county court should have received the ~~report~~ report of the executor~~and~~ and acted on it. The circuit court did not make a final order in the matter but remanded it to the county court. The court also overruled a motion made by the administrator to dismiss the appeal of the executor from the order directing him to turn over the assets to the administrator and entered an order vacating that portion of the order requiring Weldon to turn over the assets to the administrator and that said matter be remanded to the county court. From these judgments in the circuit court, Snell as administrator prosecuted appeals to the appellate Court where all three of the cases were reversed, Snell, admr. vs. Weldon, 162 Ill., App. 11, 15, and 17.

Appellant does not contend that appellees are not entitled to a judgment against him, but insists that the judgment is excessive and that the excessive amount of the judgment was caused by the evidence erroneously permitted to be heard by the jury and argues that the erroneous admission of this evidence was not cured by its subsequent exclusion.

Frank K. Lemon, John Muller, L.O.Williams, L.E.Stone, and Robert P. Vail, practicing attorneys, all testified that they knew the value of legal services and that such services as were rendered by plaintiffs in the matter of the administration were reasonably worth from $2,000. to $2,500.

The defendant only called one witness George K. Ingham, who testified that the services of plaintiffs in the administration were worth $1,000.00. A review of all the evidence shows that the verdict and judgment are not excessive, and the clear preponderance of the evidence would have justified a larger judgment for the services for which plaintiffs were entitled to recover. The amount involved was large and the questions in issue were bitterly contested at every step. It is clear that the jury were not influenced by the evidence heard by them and afterwards excluded from their consideration. Since a jury could not reasonably , on a consideration of the proper evidence, have returned a verdict for a less amount than the present judgment the defendant has no just cause of complaint and the judgment is therefore affirmed.

A F F I R M E D.

N. G. Cochran Jr.

Gen. No. 6020. April Term, 191[illegible] Agenda No. 11-

Irma Passwaters, Admx. of the estate of
Irma Passwaters, deceased.,
Appellee-

vs. ; Appeal from Circuit Court

The Lake Erie & Western
Railroad Company.,
Appellant.,

Morgan County.

188 I.A. 121

MARRIGE, J.

This is an action in case brought by appellee against appellant to recover damages for the death of Irma Passwaters, a girl about eight and one-half years of age, who was killed on the afternoon of September 2d. 1911, at a highway crossing by one of appellant's trains, while riding in a buggy with her father, Charles A. Passwaters. The trial court entered judgment in favor of appellee on the verdict of the jury assessing the damages at $3,300.00. From which judgment appellant prosecutes this appeal.

The declaration consists of five counts, charging various acts of negligence on the part of appellant and its servants and each count avers that the deceased child was exercising due care and caution for her own safety at the time of the accident.

The first error urged is that the declaration is insufficient to sustain the verdict on the ground that there is a variance between its allegations and the proofs. The basis for this contention is that, as it appears from the evidence the deceased was but eight and one half years old and was riding with her father at the time, she was therefore under his care and control, in consequence of which his negligence would be imputed to her, and the declaration should have alleged said facts and averred that the father was also exercising due care and caution at the time of the injury. No criticism is made that the declaration on its face does not state good causes of action. No authority has been cited to sustain such a rule of pleading as suggested, and we have failed to discover any. In our opinion this contention is untenable for several reasons. Her age, how she was riding, and who she was riding with are matters of development from the evidence on the

trial, and are simply evidentiary facts which need not be pleaded. Also, if, as a matter of law, the contributory negligence of the father, if any, should be imputed to deceased, then his negligence became her negligence, and is sufficiently negatived by the averment of due care and caution on her part, as such averment would also necessarily imply due care and caution on the part of the father. Elanz v. Conrad, 115 Iowa 183. The declaration is sufficient to sustain the verdict under the evidence, and the proofs do not constitute a variance therefrom.

The case of Passwaters, Admx. of the Estate of Charles A. Passwaters v. L. E. & W. R.R.Co., 181 Ill., App. 44 was an action brought by the Administratrix of the estate of the father to recover damages for his death, which occurred in the same accident. There was a verdict and judgment in favor of the plaintiff in that case, and said judgment was affirmed by this court, and a writ of certiorari denied by the Supreme Court atthe October Term, 1913, thereof. The negligence charged in the declaration and the facts in evidence surrounding the accident in that case are substantially the same as they are in this case, and we see no reason for changing our views in regard to the facts from those expressed in the opinion in that case. Therefore we must hold that the proofs establishes that the injuries resulting in the death of the deceased child were caused by the negligence of appellant as charged, and that the father was not guilty of any negligence which contributed to the injury. So even if the rule is that under such circumstances the contributory negligence of the father should be imputed to the child, it having been determined that he was not guilty of any such negligence, there is none to impute. The record in this case also discloses that there is no evidence tending to show that the child herself was guilty of any negligence whatever, and ipso facto, none that contributed to the injury. The trial Court did not err in refusing to direct a verdict for appellant, and the verdict is not contrary to the manifest weight of the evidence.

Complaint is made of the giving of the first, second and fifth instructions on behalf of appellee, on the ground that they all required the exercise of due care on the part of the father, and did not require it on the part of the deceased child. The instructions as offered by appellee in the first instance required the exercise of due care on the part of the child, but the Court modified them, by eliminating the question of due care on the part of the child, and substituting therefor the duty of the father to exercise due care. This was done evidently to conform to appellant's theory of the law. The evidence showing no negligence on behalf of the child, it was much to the advantage of appellant to maintain that the father did not use due care, and that such want of due care or contributory negligence on his part, should be imputed to the child. This was the theory of appellant throughout the trial, as is conclusively shown by its objections to the admission of evidence, its written motions to exclude the evidence and direct a verdict and its instructions. At appellant's request the Court gave nineteen instructions, six of which confine the issue to the due care of the father, and not one of them presenting the issue of due care on the part of the child.

Four instructions were asked by and given in behalf of appellant instructing the jury in substance that it should find appellant not guilty if they believed from the evidence that the father failed to exercise due care, or was guilty of negligence contributing to the injury. As stated before, appellant asked no instruction requiring the exercise of due care on the part of the child. Appellant having induced the court to adopt that theory of the law most favorable to itself, can not now insist that the Court should have adopted some other theory, nor can it complain that the Court modified appellee's instructions to conform to the theory of the law as presented by appellant's own instructions . Moreover, if there was any error in the giving of appellee's said modified instructions it was harmless, as all the evidence showed that the child, appellee

intestate, was in the exercise of due care and was not guilty of any contributory negligence.

The other criticisms of the instructions given for appellee are disposed of by the opinion in the case of Passwaters v. L.E. & W.R.R.Co., 181 Ill., App., 44. The principles of law of most of appellant's refused instructions were fully presented in the nineteen that were given, and there was no error in the refusal of the others.

Under the numerous decisions in this State on the question of damages, the verdict is not excessive. U.S.Brewing Co., v. Stoltenberg, 113 Ill., App. 435; Chicago City Ry. Co., v. Strong, 129 Ill. App. 511; C.P. & ST.L. Ry. Co., v. Boyd, 95 Ill., App., 510; West Chicago St. Ry. Co. vs. Stoltenberg, 62 Ill., App. 420; C.G.W. Ry. Co., v. Root, 106 Ill. App. 164; C. & E.I. R.R.Co., v. Fowler, 138 Ill. App. 352.

We find no reversible error in the case and the judgment will be affirmed.

A F F I R M E D.

C. D. Myers - J -

Gen. No. 6108- October Term, 1913- Agenda No. 16-

Filed May 5, 1914-

June 25, 1914 - R - H - Reversed

Henry Marriage,
Appellee-

VS. ; Appeal from Circuit Court of

Electric Coal Company.,
a corporation.,
Appellant-

Vermilion County.

188 I.A. 142

HILDEBRANDT, J.

This is an action on the case brought by appellee against appellant in the Circuit Court of Vermilion County to recover for personal injuries received while working in appellant's mines. A verdict was rendered finding appellant guilty and assessing appellee's damages at $3,545, on which verdict judgment was rendered and to review said judgment this appeal is prosecuted.

The declaration consists of four counts. The first, third and fourth charge defendant with common law negligence. The second count is predicated upon the wilful violation of Section 21 (a) of the Mines and Miners Act of 1907, which was in force at the time of the injury. In the view we take of this case the judgment must be sustained under the second count and it will be unnecessary to consider any errors assigned except such as apply to the case of the plaintiff as made out under said count. This count, in substance charges that on February 4th 1911, the defendant was operating the coal mine in question and plaintiff was in the employ of defendant as a coal digger; that in the performance of his duties it was necessary for him in going to and from his work to pass through the second southeast main entry in said mine, which was used as a single track haulage road on which trains of pit cars were moved by machinery; that plaintiff and others traveled on foot to and from their work through said entry; that defendant wilfully failed to cut in the said walls of said haulage road places of refuge not less than 3 feet in depth, 4 feet wide and 5 feet high and not more than 20 yards apart, or to provide a clear place of at least 3 feet between the sides of the cars travelling on said haulage road and the side of the road: that while travelling on foot to his work

in said entry a train of cars, or trip, struck him by reason of defendant's wilful failure to comply with the statute and plaintiff was unable to escape from said cars or trip and was crushed between the same and the side of the entry and had his hip broken and was otherwise permanently injured. The defendant filed the plea of general issue to all the counts.

At the time of the accident the mine of the defendant was constructed with a perpendicular shaft from the bottom of which an entry known as the east main south entry ran south. From this east main south entry other entries had been made to theeast , which, at the time of the accident, were not being operated. A circular entry, called the runaround , connected the various entries. Originally there was another entry which ran south from the bottom of the shaft parallel with the east main ~~entry~~ south entry and was called the back south entry. This ~~back~~ back south entry had previously been used as a passage way for miners to travel on foot to and from their work and as an air passage and in which there was no haulage of cars, but at the time of the accident had been permitted by appellant to have become filled with water and debris ~~xx~~ and for some time ~~xxis~~ prior thereto had been impassable, and abandoned. For this reason the miners in going to and from their work were compelled to pass through the east main south entry, or haulage way. In this haulage way there was laid a track upon which cars were drawn by a rope haulage system operated by a steam engine located near the bottom of the shaft. The haulage system was about 4500. feet in length, running south along the east main south entry 3000 feet, thence west about 1500 feet, to the latch. It was over a mile from the bottom of the shaft to the place where the miners worked. It is conceded that at the timeof the accident no places of refuge were constructed and maintained in this haulage way as required by section 21 of the Statute, ~~nor was there~~ and that there was not a clear space of 3 feet wide on either side of the entry between the sides of the cars and the entry, but it is contended that the failure to provide said place of refuge was not the proximate cause of the injury.

Appellee, together with five other miners, descended the shaft in the cage about 6;25 o'clock on the morning of the accident. Immediately on arriving at the bottom, appellee and another miner, Alfred Pinnet, started to walk to their work along the haulage way. When they came to its junction with the runround, a trip of cars, standing partly on the entry and ~~xxxxxx~~ partly on the runround, blocked the way, and they climbed into a car with the intention of climbing over it and proceeding upon their way. Just as they got into the car, the trip started and they stayed in while it ran about ~~xx~~ six car lengths, when it stopped. They then climbed out and walked down the haulage way toward their places of work. While they were walking down the middle of the track, Pinnet noticed, by the rope moving, that the trip had started toward them again, jumped to one side and at the same time called to appellee to watch out. Appellee attempted ~~to~~ run to the side of the entry and while doing so, the first car of the trip hit or pushed him against the side of the entry between two timbers. This did not injure him, however, and by squeezing himself closely to the side of the entry, six of the cars passed without injury, but the seventh, being wider than the others, and also having an iron extending from its side, crushed him and broke his hip.

The evidence shows that since the abandonment of the back south entry, the original passageway for the miners, it had been the custom of appellant to start a trip of about 40 cars into the mine through the haulage way each morning at about 6:45 o'clock, in which ~~xxxxxxx~~ cars the miners could ride to their places of work. Appellant sought to prove that the miners were forbidden to walk to their work through the haulage way and introduced the following rule which was posted in the mine, in support of this contention;-

"NOTICE: All employes of this company are hereby notified to keep off the rope haulage roads of this mine. Under no circumstances will any one be allowed to travel in or out of this mine on the rope haulage road except under the direction of the mine Manager or his assistant. Any one violating the above rule will be discharged".

The evidence of appellee tends to show that said rule was not enforced and that the miners either rode or walked to their work as they saw fit, and that appellant knew this fact. We are of opinion that the weight of the evidence supports appellee on this question. While the evidence does not show when the above rule was adopted or posted, it is a fair inference from the evidence that said rule was put in force when the back south entry was used by the miners in going to and from their work, and while it remained posted after the abandonment of said entry, it had no application atthe time of the injury. No reference is made therein to the fact that appellant would haul the miners to their work through the haulage way in cars. Also all the evidence shows that that part of the rule forbidding them from returning from their work on the rope haulage roads was not enforced at the time of the accident. There is no pretense that appellant hauled them from their work. They all traveled out on foot, in fact there was no other way for them to get out. Furthermore, the night boss and his assistant each testified on behalf of appellant that they warned the miners that morning not to go into the haulage way until the trip had been pulled out on to the entry. If the miners were not in the habit of walking through the haulage way, and appellant knew that fact, it would seem to have been unnecessary to have given this warning. It is evident that this rule was not adopted to apply to the conditions as they existed after the abandonment of the back south entry, but was adopted prior to the use of the haulage way for the miners to go to and from their work, and was not in force at the time of the accident Moreover, appellant itself having abandoned part of the rule , appellee had a right to assume that all of said rule was abandoned. Appellant cannot rely on a rule that it itself did not observe. It is admitted that the miners had to walk through this haulage way in returning from their work, and it therefore came within the provisions of section 21 of said act.

The giving of two instructions on behalf of appellee is assigned as error. These instructions were given on the first trial of

this case, and on the appeal from that judgment (Harriage vs. Electric Coal Co., 176 Ill. App. 451), were not assigned as error. The pleadings and evidence on this trial are substantially the same as they were on the first trial. Alleged errors which existed on the first appeal and not assigned for error, cannot be urged on a second appeal. If they had been assigned on the first appeal this court would have had an opportunity of considering them, and if well taken could have pointed out the errors and thus a repetition of them would have been avoided on the second trial. Spitzer v. Schlatt, 249 Ill. 416; Murch Coal & Ice Co. v. Howell, 217 Ill. 190; Lusk vs. City of Chicago, 211 Ill. 183. However, the first of said instructions was in regard to the law as to the preponderence of evidence, and while subject to criticism, could not have misled the jury, and the giving of it would not justify a reversal of the judgment. The other was given in relation to one of the common law counts and if erroneous, the giving of it was harmless error.

It is also urged that the Court erred in refusing to give two instructions offered on behalf of appellant. The first of these it is insisted is sustained by the case of Schlapp v. McLean County Coal Co., 235 Ill. 630. The rule announced in that case must be considered in connection with the facts to which it was applied. In that case the accident and injury happened without warning and were instantaneous, and the evidence showed that a place of refuge would have been unavailing if it had existed, and consequently the failure to provide one was not the proximate cause of the injury. The facts here are very different. Appellee was walking down the center of the entry, when Finnet warned him that the trip was coming. Knowing that there were no places of refuge in front of him to which he could go to seek safety, he did what evidently in his judgment was the only thing he could do, ran to the side of the entry on the chance that there might be space enough for the cars to pass him without injury. Under such a state of facts it certainly was the province of the jury to determine whether the failure to provide places of

refuge was the proximate cause of the injury. Brunnworth v. Kere ens Coal Co., 260 Ill. 202, and cases cited therein. This refused instruction was inapplicable to the facts in this case. The second refused instruction related to the law under one of the common law counts, was erroneous and there was no error in refusing it. Several of the instructions given for appellant were much more favorable to it than were warranted under the law. The damages awarded were not excessive for the injuries sustained and the judgment is affirmed

A F F I R M E D.

E. R. E. Arnimoughy

1236

Gen. No. 6125- October Term, 1913- Agenda No. 10-

Lawrence D. Benedict,
Appellant.,

vs. ; Appeal from Circuit Court Winnebago County.

John H. Holmes, et al.,
Appellees.

188 I.A. 145

ELDRIDGE, J.

This is an action of assumpsit brought upon the following written instrument:-

"In consideration of the purchase price paid to us for the timber described in attached bill of sale, said timber standing on Sections 2, 3, 10 and 11, Township 31 North, of Range 9 West, we hereby agree to indemnify L.D.Benedict, his heirs or assigns, against any loss or damage which may be caused him by reason of the existence of any mortgage or incumbrance on the above described premises.

(Signed) C.J. Keiser,
J.H. Holmes".

Appellees sold by bill of sale to appellant the timber standing upon about 300 acres of land for the purchase price of $2250.00. These lands, together with others, were incumbered with mortgages. After the bill of sale was executed and delivered, the agreement above set out was executed. Appellant began to remove timber from the land and cut timber therefrom for nearly a year, when a bill was filed to foreclose the mortgages and appellant was enjoined from removing any more timber from the premises. Appellant procured a modification of the injunction to the extent of permitting him to remove from the premises the timber remaining thereon which had been cut. The case was tried before the Court, without a jury, who found the issues in favor of appellant and assessed his damages at $2552.70. This amount includes the original purchase price together with interest thereon, the attorney's fees and expenses paid by appellant in procuring the modification of the injunction in the foreclosure suit. The bill of exceptions does not contain the evidence set out in full, but simply states what the evidence tended

to show. In the bill of exceptions it is stated the evidence for appellant tended to show that at the time appellant was enjoined from removing any further timber from the premises the remaining timber thereon had a reasonable cash market stumpage value of $11,000., and that it could be manufactured and sold at a profit above that amount; that the evidence for appellee tended to show that the timber so remaining at said time had a market value of not over $600: that up to said time appellant had received approximately $4,800.00- from the sale of the products of said timber and had on hand at the time of the trial about $400. worth of said products, and that appellees never received but $1500.00- of the $2250.00 consideration mentioned in the bill of sale. The contention of appellant is that the Court adopted the wrong measure of damages, that the timber sold under the bill of sale became personal property and that appellant was entitled to the profits that could be derived from the timber remaining uncut made up into manufactured articles.

The only consideration for the indemnity agreement was the executed bill of sale. This was not sufficient consideration to support the contract of indemnity, but as appellees have assigned no cross- error on which this Court will be authorized to reverse the judgment and remand the cause, the judgment of the Circuit court will be affirmed.

A F F I R M E D.

T. B. Shirley — J —

Gen. No. 6156. Oct. Term, 1913- Ag. No. 54-

Filed May 5, 1914-

Frances Van Wormer,

Appellee.,

VS. ; Appeal from Circuit Court

Metropolitan Life Insurance Sangamon County.

Company, a corporation.,

Appellant.

ELDREDGE, J.

Appellee brought suit in assumpsit against appellant Company on 3 policies of insurance issued by it on the life of Clara E. Cake. The only errors assigned relate to the cause of action charged in the second count of the declaration, which was based upon a policy for $1000.00., dated October 11, 1910. To this count appellant filed nine pleas, the first being the general issue and the other eight special pleas setting up alleged false answers made by said Clara E. Cake in her application for the policy. To these special pleas replications were filed. The jury found the issues in favor of appellee and the appeal is from the judgment entered on said verdict.

The beneficiary in the policy was the husband of the insured, Charles E. Cake, but the policy was assigned by the insured and her husband August 21, 1911, to appellee. Clara E. Cake died December 6th 1911, of pneumonia. The application and policy constitute the contract of insurance, and by the terms thereof, the alleged false answers are representations and not warranties. The burden of proving the pleas was on appellant. Two principal issues are raised by them and the replications thereto, first, were the questions in controversy asked of the deceased, and did she give the answers thereto recorded, and second, if so, were such answers knowingly false? The first issue above mentioned is general and applies to all the pleas, while the second is to

be determined by the evidence applying to each particular question and answer. The medical examination of the insured by appellant's examining physician, Dr. A.J. Sprague, was made October 14, 1910, and the alleged answers written in the application were recorded at that time. Dr. Sprague, the examining physician, has no independent recollection of the examination. At the time the examination was made the insured was living on Indiana Avenue in Chicago. Dr. Sprague was the regular examining physician of appellant company and testified that he averaged twenty-five or thirty small industrial examinations a day and of the large ones possibly ~~x~~ ~~xxx~~ one a day, and he is unable to say whether the questions were asked her with reference to diseases, including cancer, as there were times when he had to hurry over them and did not go into all the details and simply asked certain questions. Charles E. Coke, the husband of the insured, testified that he was present at the examination by Dr. Sprague and that several of the questions in controversy were not asked nor were the answers thereto recorded, given. The application contains the following question, "Have you ever had any of the following :- Any cancer or tumor"? To this question was written the answer, "NO". Below, under a sub-division denominated "Females", the following questions and answers appear in the application:- "Menstrual Derangement? No. Any tumor or disease of Breast? No. Change of Life? If yes, how long since? No. Miscarriage? No. Serious troubles in labor? No. " All these latter questions and answers under the head "Females " are stricken out by a large cross mark drawn through them. Dr. Sprague admits that he made this cross mark, but could not remember for what reason. The condition in which this application is in, taken together with the testimony of Dr. Sprague, makes it very uncertain what questions were asked and what answers were given. There was at least a conflict of evidence in this record and we can not say that the weight of the evidence shows that the controverted questions and answers were in fact asked and given.

The second plea is based upon the above question, "Any cancer

~~[illegible]~~

or tumor?". The weight of the testimony undoubtedly shows that the insured had cancer of the breast at the time she was examined by Dr. Sprague and the material question is whether she knew that fact at that time and falsely represented that she was not so afflicted. In November, 1909, she was operated on at Mercy Hospital by Dr. Sawyer, and cancerous tissue removed, but Dr. Sawyer testified that he did not tell her that she had cancer, but told her that she did not have any malignant growth. Dr. -Goodkind in May, 1910, examined her and discovered lumps on her breast and advised her to see Dr. McArthur, but did not tell her that she had cancer. Dr. Maxwell examined her in July or August, 1910, and also in November, 1910, but did not tell her that she had cancer. She visited Dr. Thompson in September, 1910, and had him examine her and stated that she wanted to use his testimony in a suit for malpractice against Dr. Sawyer for operating on her when an operation was unnecessary. Dr. Thompson did not tell her that she had cancer, but advised her not to bring the suit. From June 25th to July 21st, 1911., she was confinedin a hospital in Springfield suffering with neurasthenia, and Dr. Colby attended her. Dr. Colby told her that in his opinion she had cancer, and she strenuously insisted that she did not. All the above physicians were witnesses produced by appellant with the exception of Dr. Maxwell. ~~Twophysicians~~ Two physicians, Dr. McDonald and Dr. Spitz, testified that she admitted to them that she had cancer, but we think the weight of the evidence shows that she was firm in the belief that she was not afflicted with cancer, and this belief was wholly reasonable from the fact that Dr. Sawyer, who operated on her and made a microscopical examination of the tissues, assured her that she did not have cancer, and she persisted in this belief up to the time when Dr. Colby was attending her shortly before her death. Under these circumstances, if the above question was asked and the answer given as noted in the application, the weight of the evidence does not show that the answer was falsely made.

The third plea is based upon the above question, "Any tumor or disease of breast"? Answer, "No". This question ~~xxxxxxxxxx~~ and answer, as above stated, were picked out by Mr. Sprague, and under ~~xxxh~~ such circumstances we cannot hold that the question was asked and the answers given.

The fourth plea is based upon the following question and answer, "Have you ever been an inmate of , or have you ever attended for treatment, an asylum, hospital or sanitarium? If yes, when, how long, and for what"? Answer, "No". This question embraced at least three questions and the answer so far as the evidence shows was correct as to two of ~~them~~ them, that is , the evidence does not show that she had everbeen in a "sanitarium" or "asylum". It is an elementary principle that all ambiguities either in questions or answers must be resolved in favor of the insured. The Supreme Court in commenting upon questions which, in fact, embrace several questions, say in the case of Peterson v. Manhattan Life Insurance Company, 244 Ill. 329, "The so called question, in fact, included a half dozen questions. Where two questions are included in one, ~~xxxx~~ the fact that the party to whom they are addressed is apt to answer the second question and ignore the first is well known". The fact that the words "sanitarium" and "asylum" were connected with "hospital" might readily have misled the applicant.

The fifth plea is based upon the following question and answer, "What is name and address of your usual medical attendant"? Answer, "None". The evidence does not show who her usual medical attendant was. It shows she had consulted a number of physicians for trivial ailments, and otherwise, prior to the time she was examined for this policy. Which one she considered her usual physician is not disclosed, but, on the contrary, the evidence tends to show that none of them were considered her usual physician by her.

The sixth plea is based upon the question, "Have you consulted any other physician? If so, when and for what?" Answer "No ". This question evidently refers to the previouss question, and having named no usual physician in answer to that question, the answer would necessarily be as it was.

The seventh plea is based on this question , "When were you last confined to the house by illness"? Answer, "Never". The evidence does not show that she was ever confined to her house by illness.

The eighth plea is based upon the question, "Have you had any other illness than the above named"?" Answer "No". The evidence does not show that she ever had any other illness except trivial complaints.

~~The ninth plea is based~~

The ninth plea is based upon the question, "Have you had any other medical attendant, or have you been prescribed for by any other physician than the above named"? Answer,"No". No physician had been named in the application and consequently the answer was literally correct.

In connection with the questions embraced in the 6th, 8th and 9th pleas., if there had been any misunderstanding thereto there was another question in the application which, if an answer had been required, would have covered these matters fully and would have removed any doubt in regard to them. This question was as follows, "Give full particulars of everyillness you have had since childhood, and name of every physician who has ever attended you or prescribed for you". And under this question were columns headed, respectively, "Affection. Number of Attacks. Date . Duration. Severity. Complications. Results. Medical Attendant". Through this question and the blank spaces for the answers thereto the examiner drew another large cross, showing that the question was not asked nor any answers required thereto. The striking out of this question in the application, together with the striking out of the other important questions above noted, and the applicant being a female, were sufficient to put appellant company upon notice if the application was not satisfactory. It accepted the application in this condition and issued its policy thereon, and is now estopped from questioning the integrity of the answers expressed in said application.

The judgment of the Circuit Court will be affirmed-

J. A. Creighton - 8 —

Gen. No. 6139. Oct. Term, 1913- Ag. No. 4 0-

Filed July 2, 1914-

Frank Thoele,
Plaintiff in Error-

VS. Error to McLean.

Illinois Traction Co.,
Defendant in Error-

Thompson, P.J.

This is the second time this case has been before this court. A statement of the pleadings and the evidence as it appeared on the first trial appeats in 171 Ill., App.198. At that trial the court instructed a verdict for the defendant at the close of the plaintiff's evidence. This court reversed and remanded the case for the reason there was sufficient evidence to require the issues to be submitted to a jury. On the second trial, a jury returned a verdict for the defendant on which judgment was rendered. The plaintiff prosecutes a writ of error to review that judgment.

The plaintiff testified on the last trial in his own behalf, substantially as on the former trial in regard to the manner in which he was injured. It is insisted that after he had been cross examined, the court erred in sustaining objections to questions put to him on re-direct examination as to whether from the time he quit work up to the time he was struck he noticed the plank that struck him? The court in sustaining the objection remarked, it might be asked whether he took any special notice. The form of the question was then changed and the witness was asked and answered fully what he saw. It was within the sound discretion of the court to permit the witness to be re-examined, and the court did permit a liberal re-examination concerning things about which the witness had testified fully in his first examination.

It is also contended that the court erred in permitting the defendant to ask the court reporter if a witness, Stenstrum,

testified on the subject of a warped plank on the first trial, and in refusing to permit the plaintiff to show by the reporter that said witness was not asked any question about a warped plank. The record shows that the ruling of the court was changed, and at plaintiff's request the entire testimony of the witness, Stenstrum, at the first trial was read to the jury. The last ruling of the court cured any possible error in the first ruling. We find no error in the rulings on admission or rejection of evidence.

It is also argued that the court erred in giving an instruction on the question of fellow servants. It is not contended that the instruction does not state the law correctly. The last instruction requested by the plaintiff and read to the jury involves the question of fellow servants. The plaintiff may not complain of the giving of an instruction on a legal question involved in his own instructions.

It is also contended that the defendant's "Seventh instructinn informs the jury that if the injury was the result of an accident the jury should find the defendant not guilty". The instruction as given is, "If the jury believe from the evidence that the injury to plaintiff was the result of an accident, and not of negligence on the part of the defendant, then they should find the defendant not guilty. The instruction states a correct proposition of law and there was no error in giving it. Complaint is made of other instructions but on a careful examination of the instructions we do not find any error. The jury appear to have been fully and properly instructed on all questions involved in the case.

It is contended that the verdict and judgment are against the weight of the evidence. The evidence on behalf of defendant in the record at this trial, tends to show that plaintiff was not an ordinary workman, but was a foreman in charge of a gang of six men, and that O'Connors, the road master, whom the evidence on the former trial showed gave the order to place the planks on the car, did not give such orders. In was said in the former opinion

that it was a question of fact , for a jury to decide from the evidence , whether the defendant was guilty of the negligence alleged and the plaintiff was in the exercise of due care when injured. Reasonable men might disagree on these questions when all the evidence in the present record is considered. It was very properly a case to be decided by a jury and there being no error of law in the case, the judgment must be affirmed .

A F F I R M E D.

Oct - Nov -
1913 -

C. D. Hyde - J

Gen. No. 6168- Oct. Term, 1916- Ag. No. 76-

Filed July 2, 1916-

J.L. Stoutenborough and
Robert Miller,
Appellees.
vs. ; Appeal from DeWitt.
Edna Mae Miller,
Appellant.

188 I.A. 220

Thompson, P.J.

This is a proceeding begun in the county court of DeWitt county by the appellees, a half brother and a half sister of appellant, to have a conservator appointed for appellant, on the ground that she is a feeble-minded persons, and incapable of caring for and taking care of her property. A trial by jury, resulted in a verdict finding ~~judgment~~ defendant feeble-minded. Upon an appeal to the circuit court the cause was again tried by a jury and a similar verdict returned on which judgment was entered that a conservator should be appointed and the defendant appeals to this court.

The evidence shows that appellant was born in 1[illegible]. Her father died in 1903, leaving several children by his first wife and appellant and William C. Miller children by his second wife. Her father devised sixty acres of land to his widow for life, with remainder in fee to appellant. The widow died in April 1912. Appellant at the age of nine years was stricken with diptheria, which was followed by partial paralysis of the right side of her body, from which, with a resulting impediment in her speech, she has since suffered to some extent. After her recovery from the malignant disease, and a partial recovery from the paralysis she attended school and went through the sixth grade. Appellant lived with her mother in Gillsville for two years just preceding her mother's death and after her mother's death she went to live with Wm. C. Miller, her full brother.

In September, 1912, appellant leased her land and took two notes each for $210. for the rent from March 1, 1913, to March 1, 1914- Wm. C. Miller, discounted one of these notes in February 1913- and kept $150. of the proceeds for the board of appellant from April preceeding. In March 1913, appellant borrowed $3,000. on a note to the John Hancock Life Insurance Company, due in five years with interest at the rate of ~~x~~ five and one half per cent per annum, with the privilege of paying $100. or any multiple thereof at any interest paying period. This note was secured by a mortgage on her ~~[illegible]~~ land. Only $2, 712 was obtained on this note and mortgage, $120. have never been paid as commission, $150 retained to quiet the title and $18 paid for an abstract of title to her land. The money received by her on this loan, she let her brother have to pay his debts. Appellant took no note from her brother, when she ~~left~~ let him have the proceeds of the $3,000. note, but did , ~~shortly~~ shortly before the time of the trial in the circuit court take from him a note for $2,850. dated back to the ~~[illegible]~~ date of the mortgage. This note recites that it is given to secure appellant against any loss in the event of her brother failing to pay the interest and principal of the note executed by her to the Insurance Company .

In the trial in the circuit court twelve witnesses testified on behalf of appellees concerning the history, mental powers and characteristics of appellant and that she was feeble minded:- had a mind like a child,- and had not mental strength to manage her business. After these witnesses, who were all neighbors and associates, had testified to what they knew, and given their opinion on her mental condition, many of them were asked and permitted to answer over objection the following questions asked on behalf of petitioners:- "Do you think she could know and understand the nature of a mortgage for $3,000. executed by her upon her land"? "Do you think from your observation and that transactions you have had with her that she would know and understand the nature and effect of a note, coupons and a mortgage, do you

think she would know the effect on her?". "Do you think she would have sufficient mentality to resist the importunities of some person who was trying to induce her to sign a note or mortgage for that persons's benefit who was making the request".? The same and similar questions were asked on the cross examination of many of the eleven witnesses for defendant, after they had testified that appellant was competent to transact ordinary business.

These witnesses were not experts, they were competent witnesses to tell what they knew about appellant and gave an opinion concerning her mental condition from what they had seen and observed They knew nothing about the mortgage, except that they had been told, and were no better qualified to give an expert opinion concerning the mental capacity of appellant to understand those matters, than the jurors were to form an opinion concerning them from the evidence. The rule concerning lay witnesses is the same, whether the questions are asked on he direct or cross examination. Neely vs. Shepard, 190 Ill. 637; People vs. Payne, 161 Ill., App-640. ; Pittard vs. Foster, 12 Ill. App. 1-2.

The court also refused to admit in evidence the note given by William C. Miller to appellant. The issue tried by the jury was whether appellant at the time of the trial was feeble minded. We see no legal reason for refusing to admit the note in evidence.

The court gave an unreasonable number of instructions when the simple issue to be tried is considered. Fifteen instructions were given at the request of appellees and twenty-two at the request of appellant. Seven of the instructions given at the request of appellees, the 2nd, 5th, 12th, 13th, 14th 15th and 16th- directed the attention of the jury to the $5,000. note and mortgage, and each tells the jury they should consider this note and mortgage with all the other evidence, etc. These instructions with others, in addition to repeatedly directing the attention of the jury to the note and mortgage are very argumentative in their nature. The third is also argumentative, and tells the jury that this proceeding is for the purpose of protecting the

estate of Edna Miller. This is an assumption by the court that may, or may not betrue. It was not proper to make such a statement to the jury in an instruction. For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and Remanded.

1913 –

H. G. Cochrane – J –

Gen. No. 6187. April Term, 1914- Ag. No. 10-

Filed July 2, 1914-

Oscar Mandel and Albert Schwarzman,
Defendants in Error-

vs. ; Error to Mc Lean.

Bloomington & Normal Ry. & Light Co.,
Plaintiff in Error-

Thompson, P.J.

This is an action on the case to recover damages for injury to a team of mules, a wagon and harness ~~by~~ caused by being struck by a street car of the defendant. A trial resulted in a verdict for $350. against the defendant on which judgment was rendered. The defendant has sued out a writ of error.

Plaintiff in error operates a street railway on Market street which runs east and west in the city of Bloomington, Roosevelt Avenue intersects Market street and has an incline of over six per cent from the north. On December 20~~0~~, 1912, an employee of the defendants in error drove their team and wagon loaded with groceries down Roosevelt avenue and at the intersection of Market street was struck by the street car of plaintiff in error. There is a sharp conflict in the evidence as to the rate the team was being driven and at which the car was running. The testimony for the plaintiff in error tends to show that the team was driven at a gallpp or as fast as it could run down the hill, and that the car was only running six miles an hour at the time of the collision, while the testimony for the defendants in error tends to show that the team was only going at a walk and that the car was going at the rate of twenty-five to thirty five miles an hour and that a gong or bell was not sounded before the collision. Witnesses for defendants in error testified that the car pushed the team from 135 to 175 feet after crossing Roosevelt avenue, and the employes of plaintiff in error testified that the car went 90

feet after striking the team and stopped with the mules under the car. The driver of the wagon testified that he looked east, the direction the car came from, just before he got on Market street and did not see a car and then looked west and on again looking east the car was on the crossing and that in attempting to avoid the car he turned the team west on the track when it was struck by the car. The distance that the car went, pushing the team ahead of it after the collision occurred , tends to corroborate the evidence of defendants in error as to the speed at which the car was running.

The questions of whether the driver of the team was in the exercise of ordinary care and the plaintiff in error was guilty of negligence as averred were, in the conflicting state of the evidence peculiarly within the province of the jury to decide and this court cannot say that the verdict is against the preponderance of the evidence.

It is argued that the court erred in restrictingthe cross examination of the driver of the team. We have read the record and are of the opinion that counsel were not unduly restricted.

One witness testified that he was not an expert on mules but knew the value of them. He was then permitted to testify to the value of these mules. We fail to see why he was not competent The pleasantry in the first part of this answer did not disqualify him.

It is also insisted that the court erred in giving the ninth instruction requested by defendants in error which is;- "The jury are the judges of the questions of fact in this case, and the court does not by any instruction given to the jury in this case intend to instruct the jury how they should find any question of fact in this case". The instruction should have said "from the evidence in the case under the instructions of the court", but the jury were full instructed and the technical error is not sufficient cause for reversal since the jury could not be misled by it. C. & A. R.R.Co., vs . McDonnell, 194 Ill., 82;

South Chicago Ry. Co. v. McDonald, 196 Ill., 204-

It is also argued that the court erred in refusing plaintiff in error's second refused instruction. The instruction told the jury that it was not material whether a gong was sounded if they believed "the driver" of the team saw, or could have seen, heard, or could have heard the car by the use of reasonable care on his part". Under this instruction, if it was possible for the driver to have seen or heard the car it was immaterial whether the gong was or was not sounded. The law does not excuse the failure to sound a gong on the possibility of the traveller seeing or hearing a car in the exercise of due care, but only if in the exerfise of ordinary care he would or must have seen it.

It is also contended that the court erred in refusing certain instructions one of which is called by the plaintiff in error a "stock instruction". This and another conclude with this statment. "No juror should consent to a verdict which does not meet with the approval of his own judgment and conscience after due deliberation with his fellow jurors after fairly considering all the evidence admitted by the court and the law as given in the instructions of the court". These instructions tended to encourage and invite a disagreement. They were properly refused. City of Evanston vs. Richards, 224 Ill. 444; C. & E.I. R.R.Co., vs. Rains, 203 Ill. 417. The jury were fully instructed .

Finding no reversible error in the case he judgment is affirmed.

A F F I R M E D.

1914

C. B. Mayers

Gen. No. 6206. , April Term, 1914- Ag. No. 27-

Filed July 2, 1914-

John Richardson.,
Appellee-

VS. ; Appeal from Coles .

W.H.Johns.,
Appellant.

Thompson, P.J.

188 I.A. 234

This is a suit in assumpsit brought by John Richardson against W.H.Johns on a note for $500. dated May 22, 1904 purporting to be signed by Johns and others. The defendant filed a verified plea denying the xxxxxexecution of the note.. A jury returned a verdict finding for plaintiff on which judgment was rendered, and the defendant appeals.

The plaintiff and another witness, Willson, testified that they were present and saw the defendant sign the note Three other witnesses testified that they knew the signatures of Johns and that they believed the name W.H.Johns, signed to the note , was his writing.

One of these witnesses, Felix Johnson, president of the Second National Bank of Charleston, testified that he knew Johns; that Johns kept an account at the First National Bank of Charleston and for several years he had received and paid checks drawn by Johns on the First National Bank and that Bank had always in due course received and paid the checks received by the witness. He was then asked if the signature to the note was in the writing of the defendant and the witness answered that it looked like his signature. It is contended that this was error. The record contains no objection to the question concerning the signature to the note so that the competency of the question and answer is not saved for review .

A witness Cyrus Beavers testified that he had known Johns thirty years, and had seen him write as far back as 1903, and had seen him sign checks in payment for corn for five years and that he knew his signature. He testified that the signature to the note sued on was in the writing of Johns . It was developed on cross examination that this witness has a note against Johns, which Johns denies making, and that he had compared sig-

natures of Johns on checks with the signatures on the note sued on and his own note since this controversy arose. A motion to exclude his testimony was overruled, this ruling is assigned for error. The facts developed on the cross examination did not render him incompetent to testify to the signature but only affected his credibility.

It is also contended that the court erred in permitting the witness, Messick, who had seen the defendant execute a note on May 10, 1913, testify concerning the signature in controversy. There is no objection in the record to any of the testimony of this witness and therefore no question is saved for review concerning the evidence of this witness.

It is also contended that the court erred in the giving of two instructions at the request of plaintiff concerning the credibility of the witnesses. These instructions are in the form that has been repeatedly approved.

Finding no error in the case the judgment is affirmed.

A F F I R M E D.

Gen. No. 6228. April Term, 1914- Ag. No. 43-

Filed July 2, 1914-

George E. Luce,
Appellee-

VS. ; Appeal from McLean.

E .P. Armstrong,
Appellant.,

188 I A. 248

Thompson, P.J.

This is a suit begun before a justice of the peace by appellee to recover from appellant a balance claimed to be due for some hay shipped by appelee from Hope, North Dakota, to appellee at Bloomington. A judgment in favor of appellee was rendered in the justice's court. An appeal was taken to the circuit court where on a trial before a jury a verdict was returned for $151.75 in favor of appellee on which judgment was rendered.

The appellee took the evidence of several witnesses by depositions in Dakota. Appellant made a motion to suppress the depositions which was overruled and it is now contended that this ruling was error.

The bill of exceptions does not contain any motion to suppress the depositions or exception to the ruling thereon. A bill of exceptions is necessary to present for review rulings on motions and anything outside of the proper common law record. Schafer vs. Gerbers, Ill., ; Sturtevant Co. vs. Sullivan, 69 Ill., App. 47; Brown vs. Kennedy, 138 Ill., App. 607; Jacob vs. C. & E.I. R.R.Co., 145 Ill., App. 140. While the motion and ruling thereon are in the record and the clerk has written an exception to the ruling, that does not save the question for review. This court can only review a ruling on a motion, when the question is preserved in the bill of exceptions.

Appellant wrote from Bloomington to appellee at Hope, North Dakota, that he would pay $15. per ton "your track for A. No. 1. timothy hay and $12. per ton for A. No. 1, clover, your track". Appellee shipped to appellant three car loads of timothy hay with drafts for $389.75 attached to the bills of lading and this suit is to recover the balance of the purchase price.

The defence was that the hay was not of the quality mentioned in the correspondence. The evidence was conflicting as to the quality of the hay, but with the exceptions of two tons of prairie hay, and for that a deduction was made, the preponderance of the evidence clearly sustains the verdict and the judgment does substantial justice.

Appellant claims ~~xxxxxxxxxx~~ there was a difference between the weight of the hay at Hope and at Bloomington, and insists ~~xxxxx~~ that he bought the hay to be weighed and graded according to the custom ~~of~~ at Bloomington. The proposition of appellant under which the hay was sold to him was to pay $15.00 per ton for timothy "Your track". When the hay was placed in the cars at Hope and billed to appellant it was delivered to him there and was at his risk from that time .

There is a discussion of some of the given and refused instructions. One of appellants instructions omitted the word "timothy " in describing the hay, and used the letters F.O.B. instead of the words "your track". The meaning of the letters F.O.B. was not defined in the instruction. The term F.O.B. is one ~~of~~ in common use and its meaning is so well understood that we fail to see, when the hay was delivered free on board the cars at Hope, how a jury could be misledby its use or by the omission of the word timothy.

The jury were fully instructed concerning the law and we find no reversible error in the case, the judgment is therefore affirmed.

A F F I R M E D.

Gen. No. 6157- Oct. Term, 1913- Ag. No. ~~xxx~~ 55-

Filed July 2, 1914-

S.J.Danskin, Administrator with the
Will annexed of Karl D. Danskin., Deceased.
Appellant.,

VS. ; Appeal from Circuit Court,

Margaret A. Denny and John J. Denny, Sangamon County.
Appellees-

ELDREDGE, J.

188 I.A. 267

Appellant as administrator of the assignee brought this action in assumpsit to recover on a promissory note for the principal sum of $3,300. dated at Hillsboro, N.D. June 5, 1909, and payable on or before January 1, 1910, to Brown-Danskin Company, and purported to be executed by appellees. Appellees filed several pleas, including the general issue, with an affidavit denying the execution of the note. The only evidence offered was on that issue and there was only one instruction on each side and they related only to the execution of the note. The jury rendered a verdict in favor of appellees, on which verdict ~~xxx~~ judgment was entered. No question is raised except that the clear preponderance of the evidence shows that appellees signed the note. There was a sharp conflict of evidence on this issue and no useful purpose would be served by discussing the evidence in this opinion. From a careful consideration of the evidence we cannot say that its manifest weight is in favor of appellant. The jury saw and ~~xxxx~~ heard the witnesses and the trial court approved the verdict of the jury. The jury and the trial court had a superior opportunity of judging the credibility of the witnesses and under the evidence disclosed by the record we feel constrained to abide by their finding.

The judgment will be affirmed-

A F F I R M E D.

1913 —

A Dreiseitner —

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

188 I.A. 278

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The People &c

vs.

No. 8

March Term, 1914.

Jones

ERROR TO
~~APPEAL FROM~~

Circuit COURT

Hamilton COUNTY

TRIAL JUDGE

Hon. E. E. Nesbin

Term No. 8. Agenda No. [illegible].

March Term A.D. 1914.

The People of the State of Illinois, Defendant in Error,	
v.	Error to Hamilton.
Thomas H. Jones, Plaintiff in Error,	

188 I A. 278

Opinion by Higbee, P.J.

Thomas H. Jones, plaintiff in error, was arrested and brought before a justice of the peace on complaint sworn out by A.J.Mangis, charging him with "the criminal offense of trespass by wilfully entering and passing over an improved field, after being expressly forbidden so to do by A.J.Mangis, the owner of said field." Plaintiff in error was found guilty by the justice of the peace, and on appeal to the circuit court, the jury returned a verdict of guilty and assessed a fine of $[illegible] motion for a new trial having been overruled, the court entered judgment against plaintiff in error for the amount of the fine and cost and he brings the record here for review.

The proofs show that said Thomas H. Jones on June [illegible], 19[illegible] owned the east half of the southwest quarter of section [illegible] township five range seven in Hamilton county, Illinois, which he purchased the same about 1866 and that A.J.Mangis owned the south half of the northwest quarter of said section, which he purchased it in 1881 from his brother, who had owned it since [illegible]. The north forty of the Jones eighty acres, therefore joined the east forty of the Mangis eighty, which was directly north [illegible]

Term No. 8. Cause No. 14.

March Term A.D. 1884.

The People of the State of Illinois, Defendant in Error,	
v.	Error to Bureau.
Thomas H. Jones, Plaintiff in Error,	

Opinion by Higbee, P.J.

Thomas H. Jones, plaintiff in error, was convicted in the Bureau circuit court of a misdemeanor, in having in his possession a certain instrument and device with intent to cheat and defraud, and was sentenced to the penitentiary for the term of one year. The record is brought before a justice of the peace on complaint sworn to by A.J.Mangia, charging him with the criminal offense of cheating by wrongfully entering and pushing over an impressed disk, contrary to the statute in such case made and provided, and being over an impressed disk, contrary being expressly forbidden so to do by A.J.Mangia, the owner of said field." Plaintiff in error was found guilty before the justice of the peace, and on appeal to the circuit court, the jury returned a verdict of guilty, and he moved a new trial, and on motion for a new trial being overruled, he moved in arrest of judgment, and that plaintiff in error for the reasons of the case and cost and he brings the record here for review.

The proofs show that said Thomas H. Jones, on March 14, 1884, owned the east half of the northwest quarter of section 4, in township five range seven in Bureau county, Illinois, and purchased the same about 1866 and that A.J.Mangia owned the south half of the northwest quarter of said section, and purchased it in 1881 from his brother, who had owned it over 10 years. The north forty of the Jones eighty, therefore joined the east forty of the Mangia eighty, which lay directly north of it.

There was a conflict between the respective owners as to where the division line was located and there was and is a strip of land about six rods wide at one end and thirteen at the other, extending east and west at the junction of the two forties claimed by both Jones and Mangis. Mangis claimed, and the evidence at least tended to show, that he had held such strip of land under the claim of ownership and of adverse possession for more than twenty years. On the other hand Jones claimed and intoduced evidence for the purpose of showing, that the greater part of the strip had been abandoned for a number of years, and had been permitted to grow up in brush and young timber; that he did not know until the spring of 1913 that Mangis had lately attempted to cultivate any part of it. He also introduced surveys in evidence, tending to show the land in dispute was a part of his north forty acres. It is not disputed that Jones and those assisting him went upon the land in controversy and put a fence along the north side thereof and his act in so doing is the offense complained of. Jones while insisting upon his ownership of the property, relies also as a defense upon the claimed fact that he was not expressly forbidden to enter the premises in the manner required by statute to be done before he could be held guilty of the offense of trespass. On this question the evidence is meager and unsatisfactory. Mangis testified that in 1907 the highway commissioners talked of putting a road through between the two forties and he then prepared a notice addressed to Jones and the highway commissioners, forbidding them to come upon the land and caused his sister to post it up in the disputed strip. He also stated that Jones came to him "last spring" and wanted to know what he was going to do about the

There was a conflict between the respective owners as to where the division line was located and there was in a strip of land about six rods wide at one end and thirteen at the other, extending east and west at the junction of the two fractions claimed by both Jones and Smyth. Smyth claimed, and the evidence at least tended to show, that he had held adverse possession of land under the claim of ownership and of adverse possession for more than twenty years. One the other hand Jones claimed and introduced evidence for the purpose of showing, that the greater part of the strip had been abandoned for a number of years, and had been permitted to grow up in brush and young timber; that he did not know until the spring of 1913 that Smyth had lately attempted to cultivate any part of it. He also introduced surveys in evidence, tending to show the land in dispute was a part of his north forty acres. It is not disputed that Jones had those assisting him went upon the land in controversy and put a fence along the north side thereof and his agent by so doing is the offense complained of. Jones while instructing upon his ownership of the property, relies also as a defense upon the claimed fact that he was not expressly forbidden to enter the premises in the manner required by statute to be done before he could be held guilty of the offense of trespass. In this condition the evidence is meager and unsatisfactory. Smyth testified that in 1907 the highway commissioners talked of putting a road through between the two forties and he then prepared a notice addressed to Jones and the highway commissioners, forbidding them to come upon the land and caused his sister to post it up in the disputed strip. He also stated that Jones came to him "last spring" and asked to know what he was going to do about the

fence and that he told Jones he had nothing to say about the matter and that he wanted him (Jones) to keep off the premises. Martha Mangis a sister of the complaining witness, testified she put up the notice referred to by him; that it was signed by A.J.Mangis, addressed to Jones and the highway commissioners and that "the substance was for them to stay off of his possession there and not to come there and make a road". Jones positively denies that Mangis ever told him to keep off his premises and states that he never read the posted notice and did not know the contents of it.

Under the statute, before Jones could properly be found guilty of trespass he must have been expressly forbidden by Mangis as owner of the premises in question, from entering upon the same, there being no claim that any notice was given to Jones by a tenant of Mangis, who was in the actual possession of the premises. The written notice which Mangis caused to be posted some years before the alleged trespass, was given for the purpose of preventing the commissioners from establishing a road over the disputed territory and was not even seen by Jones to whom it is said to have been directed, as well as to the commissioners, and therefore it could not possibly be construed to be the express notice required by the statute as the basis of a prosecution for trespass, such as this. Mangis statement of the oral notice given by him to Jones when the latter called on him to see what he was going to do about the fence was,'I told him I had nothing to say to him at all, and I wanted him to keep off my premises". This notice, if it may be called such, does not appear to us to have been sufficiently definite to constitute

Tence and that he told Jones he had nothing to say about the matter and that he wanted him (Jones) to keep off the premises. Martha Mangia a sister of the complaining witness, testified she put up the notice referred to by him; that it was signed by A.J.Mangia, addressed to Jones and the delivery consisted in that "the substance was for them to stay off of his possession there and not to come there and make a road". Jones positively denies that Mangia ever told him to keep off his premises and states that he never read the posted notice and did not know the contents of it.

Under the statute, before Jones could properly be found guilty of trespass he must have been expressly forbidden by Mangia as owner of the premises in question, from entering upon the same, there being no claim that any notice was given to Jones by a tenant of Mangia, who was in the actual possession of the premises. The written notice which ~~[illegible]~~ claimed to be posted some years before the alleged trespass, was given for the purpose of preventing the commissioners from establishing a road over the disputed territory and was not even seen by Jones to whom it is said to have been directed, as well as to the commissioners, and therefore it could not possibly be considered to be the express notice required by the statute as the basis of a prosecution for trespass, such as this. Mangia testified to his oral notice given by him to Jones when the latter called on him to see what he was going to do about the fence saw,"I told him I had nothing to say to him at all, and I wanted him to keep off my premises". This notice, if it may be called such, does not appear to us to have been sufficiently definite to constitute

the express prohibition required by the statute. They were not spoken and these may well have indicated simply a desire on the part of Mangis that Jones should not come upon any land owned by him, a wish to have nothing whatever to do with Jones. The strip of land in controversy seems to have been claimed by both Jones and Mangis in good faith and there does not appear to have been any wilful desire on the part of Jones to trespass or enter upon the land of Mangis, but simply a wish to fence in his own land. This suit in fact appears to be an attempt to try the title to the strip of land in question, which cannot properly be done in a proceeding such as this.

The judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

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(Not to be reported in full).

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not spoken and these may well have indicated simply a desire
on the part of Mangia that Jones should not care upon any
land owned by him, a wish to have nothing whatever to do with
Jones. The strip of land in controversy seems to have been
claimed by both Jones and Mangia in good faith and there [illegible]
not appear to have been any willful desire on the part of [illegible]
to trespass or enter upon the land of Mangia, but simply a
wish to fence in his own land. This suit in fact appears to
be an attempt to try the title to the strip of land in question,
which cannot properly be done in a proceeding such as this.

The judgment of the court below is reversed and the cause
remanded.

Reversed and remanded.

****

(Not to be reported in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28 th *day of July, A. D. 1914.*

Clerk of the Appellate Court.

OPINION

Fee $

1283 1229

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Paul Kuhn & Co.

vs.

No. 11

March Term, 1914.

Pulaski County Mill & Elevator Co

~~ERROR TO~~
APPEAL FROM

188 I.A. 279

Circuit COURT

Pulaski COUNTY

TRIAL JUDGE

Hon. A. N. Lewis.

Term No. 11. Agenda No. 4.

March Term A.D.1914.

Paul Kuhn et al, Partners, etc., Appellants.	
v.	Appeal from Pulaski.
Pulaski County Mill and Elevator Company, Appellee.	

188 I.A. 279

Opinion by Higbee, P.J.

This suit was instituted by Paul Kuhn and Elizabeth J. Kuhn, partners doing business under the name of Paul Kuhn and Company, appellants, against Pulaski County Mill and Elevator Company, a corporation, appellee, before a justice of the peace of Pulaski countym to recover $176.10, claimed by appellant to be due to them by reason of an over payment made by them to appellee for certain wheat which was not up to the grade agreed to be furnished by the latter.

Appellants recovered a judgment for the amount claimed before the justice of the peace, but on an appeal to the circuit court where the cause was tried by the court without a jury, the issues were found for appellee and judgment entered against appellants for costs. From that judgment an appeal has been taken to this court by the plaintiff below. There were no propositions of law submitted to the trial court and the only question presented to this court for determination is did or did not the proofs show a right of recovery against appellee.

The evidence shows that prior to July 1, 1910, appellee a corporation, whose stock which was held by T.J.Davidson, [illegible]

Term No. 11. Agenda No. 4.

March Term A.D.1914.

Paul Kuhn et al, Partners, etc., Appellants.	
v.	Appeal from Pulaski.
Pulaski County Mill and Elevator Company, Appellee.	

Opinion by Hughes, J.1.

This suit was instituted by Paul Kuhn and Elizabeth A. Kuhn, partners doing business under the name of Paul Kuhn and Company, appellants, against Pulaski County Mill and Elevator Company, a corporation, appellee, before a justice of the peace of Pulaski county to recover $176.10, claimed by appellant to be due to them by reason of an over payment made by them to appellee for certain wheat which was not up to the grade agreed to be furnished by the latter.

Appellants recovered a judgment for the amount claimed before the justice of the peace, but on an appeal to the circuit court where the cause was tried by the court without a jury, the issues were found for appellee and judgment entered against appellants for costs. From that judgment an appeal has been taken to this court by the plaintiff below. There are no propositions of law submitted to the trial court and the only question presented to this court for determination is did or did not the proofs show a right of recovery against appellee.

The evidence shows that prior to July 1, 1910, appellee a corporation, whose stock which was held by S.J.Levinson, his

wife and James Bartleson, owned and was operating a flour mill at Grand Chain, Illinois, and was also engaged in buying and selling grain at that place. Davidson was the general manager and secretary of the corporation and transacted substantially all its business. Bartleson who was president of the company lived at Olmstead, a place about seven miles from Grand Chain. Early in July, 1910 appellee leased its property to Charles Zimmer and Louis Zimmer, brothers, who carried on the business until sometime in February, 1911, when the property was turned back by them to appellee. Appellants were engaged in business at Terre Haute, Indiana, buying and selling grain, Paul Kuhn being in charge of their business. They were accustomed to send out market quotations and these were received by Zimmer Brothers. In the latter part of July, 1910, appellants received the following letter: "Pulaski County Mill & Elevator Co. Incorporated. Manufacturers of Pure Winter Wheat Flour. Grand Chain, Illinois. July 22nd, 1910.

Paul Kuhn & Co.,
Terre Haute, Ind.

Gentlemen:- Have been receiving your market quotations daily and will be able to do business with you on both wheat and corn. We will telegraph you when we have anything to offer.

Yours respectfully,
Pulaski County Mill & Elevator Co.
Chas. Zimmer.

No one connected with the Pulaski County Mill & Elevator Company knew of the sending of this letter or had anything to do with it, but it was written and mailed for and on behalf of the Zimmer Brothers. Shortly thereafter a number of telegrams passed between the Zimmers and appellants, relative to buying and selling wheat. Those sent by the Zimmer Brothers were signed with the corporate name of appellee, the name of Zimmer not

wife and James Bartleson, owned and was operating a flour mill at Grand Chain, Illinois, and was also engaged in buying and selling grain at that place. Davidson was the general manager and secretary of the corporation and transacted substantially all its business. Bartleson was president of the company. Lived at Olmstead, a place about seven miles from Grand Chain. Early in July, 1910 appellee leased its property to Charles Zimmer and Louis Zimmer, brothers, who carried on the business until sometime in February, 1911, when the property was turned back by them to appellee. Appellants were engaged in business at Terre Haute, Indiana, buying and selling grain, and were doing in charge of their business. They were accustomed to send out market quotations and these were received by Charles Zimmer. In the latter part of July, 1910, appellants received the following letter: "Pulaski County Mill & Elevator Co. Incorporated. Manufacturers of Pure Winter Wheat Flour. Grand Chain, Illinois. July 23rd, 1910.

Paul Kuhn & Co.,
Terre Haute, Ind.

Gentlemen:- Have been receiving your market quotations daily and will be able to do business with you on Both wheat and corn. We will telegraph you when we have anything to offer.

Yours respectfully,
Pulaski County Mill & Elevator Co.
Chas. Zimmer.

No one connected with the Pulaski County Mill & Elevator Company knew of the sending of this letter or had anything to do with it, but it was written and mailed for and on behalf of Zimmer Brothers. Shortly thereafter a number of telegrams passed between the Zimmers and appellants, relating to buying and selling wheat. Those sent by the Zimmer brothers were signed with the corporate name of appellee, the name of Zimmer not

appearing, but some of them were followed by letters which were also signed with appellee's name under it being written "Charles Zimmer". Through this correspondence appellants purchased four cars of wheat to be shipped to Terre Haute, which was to grade No.2 with weights and inspection guaranteed at Terre Haute. In pursuance of this contract four cars of wheat were sent by the Zimmers to appellants at Terre Haute. With each car a bill of lading with draft attached was sent through the bank so that appellants could only get the wheat by paying the several amounts of the drafts which were drawn, on a basis of the price to be paid for No. 2 wheat. When possession of the wheat was obtained by appellants and inspection made, it was found none of it graded No. 2, part of it being No. 4 and the balance "no grade". Appellants honored the drafts paid for the wheat shipped them by the Zimmers, paying $176.10 more than they should have paid, had the drafts been based on the actual price of wheat of the grade shipped them. The drafts paid by appellants were signed "Pulaski Co.Mill & Ele. Co. per Louis H.Zimmer", and were dated August 4,6,and 8, 1910 respectively. W.J.Davidson manager and secretary of appellee testified that when the property was leased he told the Zimmers not to use the company's name and that he did not know they were using it until sometime in the fall which was after the transactions between the Zimmers and appellant had taken place; that he then went to them and told them again not to use the company's name; that when the Zimmers took charge of the mill he took the stationery and the books home with him but left a few paper bags with the name of the company on them; that he did not know where the Zimmers got the letter heads they used, unless they had them printed; that after the leasing of the property he moved to his farm several miles from town; that

appearing, but some of them were followed by letters which were also signed with appellee's name under it being written "Zimmer". Through this correspondence appellants purchased four cars of wheat to be shipped to Terre Haute, which was of grade No.2 with weights and inspection guaranteed at Terre Haute. In pursuance of this contract four cars of wheat were sent by the Zimmers to appellants at Terre Haute. With each car a car of lading with draft attached was sent through the bank so that appellants could only get the wheat by paying the invoiced consideration of the drafts which were drawn, on a basis of the price to be paid for No. 2 wheat. When possession of the wheat was obtained by appellants and inspection made, it was found none of it graded No. 2, part of it being No. 4 and the balance "no grade". Appellants honored the drafts paid for the wheat shipped them by the Zimmers, paying $176.10 more than they should have done had the drafts been based on the actual price of wheat of the grade shipped them. The drafts paid by appellants were signed "Pulaski Co.Mill & Ele. Co. per Louis Zimmer", and were dated August 4,6,and 8, 1910 respectively. L.J.Davidson managed and secretary of appellee testified that when the property was leased he told the Zimmers not to use the company's name for that he did not know they were using it until sometime in the fall, which was after the transactions between the Zimmers and appellant had taken place; that he then went to them and told them again not to use the company's name; that when the Zimmers took charge of the mill he took the stationery and the books home with him but left a few paper bags with the name of the company on them; that he did not know where the Zimmers got the letter heads they used, unless they had them printed; that after the leasing of the property he moved to his farm several miles from town, that

appellee and the Zimmer Brothers had separate boxes at the postoffice and he got the company's mail about once a week when he came to town; that the company never did business with, and he did not know nor had he ever heard of appellants until after this suit was commenced.

James Bartleson, appellee's president, swore he lived seven miles from Grand Chain and that he did not authorize the Zimmers to use the corporation name in the transaction of business and did not know they were using the same; that he knew nothing about the transaction between appellant and the Zimmers until after the latter had left the mill. That appellee's name was used in the correspondence connected with the sale of the wheat in question to appellant is plain and in fact is not denied, but it is also clear that it was used by the Zimmers without its knowledge or consent and against the express instruction of its manager. There is no evidence even tending to show nor does it appear to be claimed by appellants that the Zimmers were authorized to act as agents of appellee or that the latter in any way knew or profited by the transaction in question. The Zimmer brothers are shown by the proofs to have been clearly liable to appellants for the amount claimed but appellants are seeking to bind appellee in the transaction with which it had nothing to do because the parties who are liable to respond in damages used appellee's corporate name in carrying on the transaction with which this suit is concerned. Not only does the uncontradicted evidence show that appellee did not authorize the Zimmer brothers to use its corporate name or act as its agent, but the proofs also fail to disclose any act on the part of appellee which could lead appellants to believe that the Zimmer brothers were acting as its agent or the Zimmer brothers to believe that they had a right to the use of such name or to act as such agent.

appellee and the Zimmer brothers had separate letter at the postoffice and he got the company's mail. Later came a man who came to town; that the company never did business with him. He did not know nor had he ever heard of appellants until after this suit was commenced.

James Bartleson, appellee's president, swore he lived miles from Grand Chain and that he did not authorize the Zimmer to use the corporation name in the transaction of business and did not know they were using the name; that he knew nothing about the transaction between appellant and the Zimmers until after the latter had left the mill. That appellee's name was used in the correspondence connected with the sale of the wheat is a question to appellant is plain and in fact is not denied, but it is also clear that it was used by the Zimmers without the knowledge or consent and against the express instructions of its manager. There is no evidence even tending to show that does it appear to be claimed by appellants that the Zimmers were authorized to act as agents of appellee or that the former in any way knew or profited by the transaction in question. The Zimmer brothers are shown by the proofs to have been responsible to appellants for the amount claimed but appellant is seeking to bind appellee in the transaction with Zimmer. It is not anything to do because the parties who are liable to appellant for damages used appellee's corporate name in carrying on the transaction with which this suit is concerned. Not only does the uncontradicted evidence show that appellee did not authorize the Zimmer brothers to use its corporate name or act as its agent, but the proofs also tend to disclose any act on the part of appellee which could lead appellants to believe that the Zimmer brothers were acting as its agent or the agent of anyone to believe that they had a right to the use of the name or to act as such agent.

A mere showing that one assumes to act as agent is not sufficient to establish an agency. Nor can the agency be proved by the act of the supposed agent neither expressly nor impliedly authorized by the alleged principal. Fleischman & Co. v. Ballou 131 Ill. App. 564.

Where one attempts to take advantage of the act of a claimed agent, the burden is upon him to show the authority to that agent. Jackson Paper Co. v. Commercial Bank 109 Ill. 151. While appellants may have been mislead by the use made by the Zimmers of appellee's corporate name in the transaction in question, yet the proofs fail to show any act of commission or omission on the part of appellee which should or does render it liable to appellant growing out of its transactions with the Zimmers upon which this suit is based.

The Judgment of the court below will be affirmed.

****** * ** ****

(Not to be reported in full).

A mere showing that one assumes to act as agent is not sufficient to establish an agency. Nor can the agency be proved by the act of the supposed agent neither expressly nor impliedly authorized by the alleged principal. Stetson & Co. v. Dallon 121 Ill. App. 564.

Where one attempts to take advantage of the act of a claimed agent, the burden is upon him to show the authority to that agent. Jackson Paper Co. v. Commercial Bank 129 Ill. 181. While appellants may have been misled by the use made by the Zimmers of appellee's corporate name in the transaction in question, yet the proofs fail to show any act of commission or omission on the part of appellee which should or does render it liable to appellant growing out of the transaction with the Zimmers upon which this suit is based.

The judgment of the court below will be affirmed.

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(Not to be reported in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

Clerk of the Appellate Court.

OPINION

Fee $

1285 1231

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Lawson Est.
Kimmel, Executor

vs.

No. 16

March Term, 1914.

Stafford

~~ERROR TO~~
APPEAL FROM

188 I.A. 285

Circuit COURT

Perry COUNTY

TRIAL JUDGE

Hon. W. E. Hartley

Term No. 16. Agenda No. [illegible].

March Term A.D.1914.

Ella Stafford, Appellee	
v.	Appeal from Perry.
H.E.Kimmel, Executor, etc. Appelant.	

188 I.A. 285

Opinion by Higbee, P.J.

Appellee was allowed $750 as a claim against the estate of Matthew Laxon, deceased for services rendered deceased as a housekeeper and nurse. H.E.Kimmel, executor, prayed an appeal to the circuit court from the order of the county court, allowing the claim, but filed no appeal bond. A transcript was filed and the case docketed in the circuit court where appellee made a motion to dismiss the appeal for want of an appeal bond, which was sustained by the court and the appeal dismissed.

The circumstances connected with the proceedings in the circuit court upon the dismissal of the appeal, were identical with those which are involved in the case of E.C.Stafford v. H.E.Kimmel, executor, etc., where a similar claim for services rendered deceased, was filed and wherein an opinion was this day filed to the present term of this court. For the reasons stated in said opinion, the judgment of the court below will be affirmed in this case.

Affirmed.

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(Not to be published in full)

Term No. 16.

March Term A.D.1914.

Nile Stafford, Appellee v. H.T.Himmel, Executor, etc. Appellant.	Appeal from Ferry.

Opinion by McGee, P.J.

Appellee was allowed $750 on a claim against the estate of Matthew Lemon, deceased for services rendered deceased as a housekeeper and nurse. H.T.Himmel, executor, prayed an appeal to the circuit court from the order of the county court, allowing the claim, but filed no appeal bond. A transcript was filed and the case docketed in the circuit court where appellee made a motion to dismiss the appeal for want of an appeal bond, which was sustained by the court and the appeal dismissed.

The circumstances connected with the proceedings in the circuit court upon the dismissal of the appeal, were identical with those which are involved in the case of [illegible] v. H.H.Himmel, executor, etc., where a similar claim for services rendered deceased, was filed and wherein an opinion has been filed to the present term of this court. For the reasons stated in said opinion, the judgment of the county court will be affirmed in this case.

Affirmed.

****

(Not to be published in full)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

1287

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 27th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

McAlleman

vs.

No. 20

March Term, 1914.

E. St. Louis Light & Power Co.

~~ERROR TO~~
APPEAL FROM

188 I.A. 291

City COURT

E. St. Louis ~~COUNTY~~

TRIAL JUDGE

Hon. W. M. Vandeventer

Term No. 20. Agenda No. 40.

March Term ,A D. 1914.

Thomas C. McAleeman, Appellee, v. East St. Louis Light and Power Company, Appellant.	Appeal from City Court Of East St. Louis.

Opinion by Higbee,P.J.

In this suit appellee, Thomas C. McAleenan, claimed that his horse was frightened and caused to run away by the carelessness of the servants of the East St. Louis Light and Power Company, appellant, resulting in injuries to the horse of such a nature as to render it necessary that it be killed and damaging the wagon and harness. The amended declaration on which the case was tried, charged that one of appellant's servants, carelessly, negligently and improperly, threw a certain rope which he then and there held coiled in his hand, to another servant, who was then on a telegraph or telephone pole, standing within a short distance from where the horse of appellee was tied, in such a manner as to frighten and scare the horse and cause it to break his halter and run away. There was a plea of not guilty and a verdict in favor of appellee, for $300. A remittitur was entered by appellee and judgment ~~xxxxxxxxxxxx~~ given for $213.60. Some days later the judgment was vacated and appellee given leave to file an additional count to the declaration. In the meantime an appeal had been prayed from the judgment and an appeal bond filed. Appellee instead of filing

Term No. 20. Agenda No. 40.

March Term, A. D. 1914.

Thomas C. McAleenan, Appellee, v. East St. Louis Light and Power Company, Appellant.	Appeal from City Court of East St. Louis.

1881.A. 291

Opinion by Higbee, P.J.

In this suit appellee, Thomas C. McAleenan, claimed that his horse was frightened and caused to run away by the negligence of the servants of the East St. Louis Light and Power Company, appellant, resulting in injuries to the horse of such a nature as to render it necessary that it be killed and damaging the wagon and harness. The amended declaration on which the case was tried, charged that one of appellant's servants, carelessly, negligently and improperly, threw a certain rope which he then and there held coiled in his hand, to another servant, who was then on a telegraph or telephone pole, standing within a short distance from where the horse of appellee was tied, in such a manner as to frighten and scare the horse and cause it to break his halter and run away. There was a plea of not guilty and a verdict in favor of appellee, for $300. A remittitur was entered by appellee and judgment accordingly given for $213.60. Some days later the judgment was vacated and appellee given leave to file an additional count to the declaration. In the meantime an appeal had been prayed from the judgment and an appeal bond filed. Appellee instead of filing

an additional count to the declaration in accordance with the leave given him, filed a complete amended declaration. He then again entered the remittitur and judgment was a second time entered for $213.60 and an appeal allowed. Counsel for appellee state that the second amended declaration was filed in their absence and that they were given no opportunity to plead to the same. The last amended declaration filed, omitted the allegations of negligence above set forth in the former amended declaration and in lieu thereof charged, that on August 9, 1[illegible], appellee securely fastened his horse to a hitching post on the easterly side of Collinsville Avenue in the city of East St. Louis, Illinois: that while said horse was so hitched and fastened, a servant of defendant engaged in its business, climbed a certain telephone, telegraph or electric light pole standing in front of and within a short distance from where the horse was tied, with a certain rope, one end of which was attached to or held by the said servant, and while said servant was on said pole he carelessly, negligently, and improperly dropped or threw the end of said rope to the ground while he was still holding to the other end of the same; that said rope so suspended, dangled and moved in a vibratory manner near to and in front of said horse so as to frighten and scare it and cause it to break loose and run away.

Waiving the question as to whether the trial court properly exercised its discretion in permitting the amended declaration to be filed in the absence of counsel for appellee and after the appeal bond had been filed, we will treat the case on this appeal as though the amendment had been allowed in the usual manner upon the trial. When the last amended declaration was filed, the charges contained in the previous declaration were abandoned and the case must stand on the allegations

an additional count to the declaration in accordance with leave given him, filed a complete amended declaration. The court again entered the remittitur and judgment and a second time entered for $12,000 and an appeal allowed. Counsel for appellant state that the second amended declaration was filed in their absence and that they were given no opportunity to plead to the same. The last amended declaration filed, omitts the allegations of negligence above set forth in the former declaration and in lieu thereof charges, that on August 1, appellee securely fastened his horse to a hitching post on the eastern side of Collinsville Avenue in the city of East St. Louis, Illinois; that while said horse was so hitched and fastened, a servant of defendant engaged in the business, attached a certain telephone, telegraph or electric light pole standing in front of and within a short distance from where the horse was tied, with a certain rope, one end of which was attached to or held by the said servant, and while said servant was on said pole he carelessly, negligently, and improperly dropped or threw the end of said rope to the ground while he was still holding to the other end of the same; that said horse so suspended, dangled and moved in a vibratory manner near in and in front of said horse so as to frighten and scare it and cause it to break loose and run away.

Waiving the question as to whether the trial court properly exercised its discretion in permitting the amended declaration to be filed in the absence of counsel for appellant and after the appeal bond had been filed, we will treat the case on this appeal as though the amendment had been filed in the usual manner upon the trial. When the last amended declaration was filed, the charges contained in the previous declarations were abandoned and the case must stand on the allegations

contained in the last declaration. There can be but one declaration in the case and when appellee filed his final amended declaration he abandoned his former declaration, and the last declaration could not be aided by anything contained in the former. Foster v Adler 64 Ill.App.654. Joiner v. Fowler 133 Id. 38.

The proffs show appellant has a line of electric light poles along the east side of Collinsville Avenue in East St. Louis. One of these poles is located at the edge of the sidewalk opposite what is known as the Peoples Store and some five to eight feet south of this pole was an iron hitching post. On the morning of August 9th, 1913, appellee tied his horse by a strap halter to the post and went away to attend to some business matters. The Horse faced north towards the post in question and was hitched to a spring wagon. At about 11 o'clock, some thirty minutes after appellee had left his horse, appellant's line crew, consisting of three men, drove up in a line wagon, carrying tools and materials and stopped some forty feet north of the pole on the opposite side of the from the horse. The crew came there to attach an electric wire at the top of the pole and run one therefrom across the sidewalk into the Peoples Store. Appelant claims that their respective duties were as follows: One member was to climb the pole and make the connection, another to bore a hole in the brick building and prepare for a bracket to be placed there to hold the wire as it entered the building and the other to remain at the wagon and make the braket, and on the trial the three men testified to having been so engaged at the time the horse broke loose and ran away. Appellee was not present at this time and had to rely upon the testimony of others to sustain

contained in the last declaration. There can be but one declaration in the case and then appellee filed the final amended declaration be abandoned his former declaration, and the last declaration could not be aided by anything contained in the former. Foster v Adler 84 Ill.App.484. Tobin v. Bowler 138 Id. 38.

The proofs show appellant has a line of electric light poles along the east side of Cottageville Avenue in West Louis. One of these poles is located at the edge of the sidewalk opposite what is known as the People Store and five to eight feet south of this pole was a wooden hitching post. On the morning of August 9th, 1913, appellee tied his horse by a strap halter to the post and went away to attend to some business matters. The horse faced north towards the post in question and was hitched to a spring wagon. At about 11 o'clock, some thirty minutes after appellee had left his horse, appellant's line crew, consisting of three men, drove up in a line wagon, carrying tools and materials and stopped some forty feet north of the pole on the opposite side of it from the horse. The crew came there to attach an electric wire at the top of the pole and run one therefrom across the sidewalk into the People Store. Appellant claims that their respective duties were as follows: One member was to climb the pole and make the connection, another to bore a hole in the brick building and prepare for a bracket to be placed there to hold the wire as it entered the building and the other to remain at the wagon and make the bracket, and on the total the three men testified to having been so engaged at the time the horse broke loose and ran away. Appellee was not present at that time and had to rely upon the testimony of others to establish

his case. His principal witness was [illegible] Osenberg, who testified that he went across the street from the building where the horse was tied to a saloon to get a can of beer, and as he came back he saw one of appellant's servants standing on the ground coiling up a line of rope and throwing it to the man on the pole; as the man did that the horse reared back, broke loose and swung right around in the street and went down Collinsville Avenue; that the man to whom the rope was thrown was up at the arms of the pole 18 or 20 feet from the ground and he caught the end of it and the rope dangled down in front of the horse; that the thing that started the horse was the man on the ground throwing the rope up there; that he scared the horse.

John H. Smith, another witness who was some 20 feet away, saw the horse break loose, but did not see the man on the ground throw the rope. He stated he did see the man on the telegraph pole taking off some wire from the reel; that he did not see what caused the horse to break loose, but there was a rope dangling down from the pole about two minutes after the horse had started to go. The three employes of appellant swore that no one of their crew threw a rope to the man on the pole; that before ascending the pole the man who was to work at that place, fastened one end of the rope to his belt and left the coil on the sidewalk and then went up the pole 18 or 20 feet; that part of the rope was in the coil on the sidewalk and the rest was at the side of the pole extending up to where it was attached to the man at work there. The man who was on the pole, Ohlendorf, stated, that he had not gotten ready to work, that he had just reached the cross arm and was strapping his safety appliance to it, and was getting himself in position for work, when he saw the horse and wagon going

his case. His principal witness was G. E. Goodman, who testified that he went across the street from the [illegible] where the horse was tied to a saloon to get a cab [illegible], and as he came back he saw one of appellant's servants standing on the ground coiling up a line of rope and throwing it to the man on the pole; as the man did that the horse reared and broke loose and swung right around in the street and went down Collinsville Avenue; that the man to whom the rope was thrown was up at the arms of the pole 18 or 20 feet from the ground and he caught the end of it and the rope dangled down in front of the horse; that the thing that started the horse was the man on the ground throwing the rope up there; that he scared the horse.

John H. Smith, another witness who was some 20 feet away, saw the horse break loose, but did not see the man on the ground throw the rope. He stated he did see the man on the telegraph pole taking off some wire from the reel; that he did not see what caused the horse to break loose, but there was a rope dangling down from the pole about two minutes after the horse had started to go. The three employes of appellant swore that no one of their crew threw a rope to the man at the pole; that before ascending the pole the man who was at work at that place, fastened one end of the rope to his belt and left the coil on the sidewalk and then went up the pole 18 or 20 feet; that part of the rope was in the coil on the sidewalk and the rest was at the sidewalk at the pole extending to where it was attached to the man at work there. The man who was on the pole, Chlendorf, stated, that he had not gotten ready to work, that he had just reached the cross arm and was strapping his safety appliance to it, and was getting himself in position for work, when he saw the horse and wagon going

down the street.

The witnesses on the part of appellant testified that they did not know what scared the horse. It will thus appear that there was no proof whatever tending to sustain the charge of the last amended declaration, that the employee of appellant on the pole carelessly, negligently and improperly dropped or threw the end of the rope to the ground and frightened the horse, thereby causing him to run away and the verdict and judgment based upon the proof which was introduced, cannot be sustained. We may also state that in our opinion the weight of the evidence was clearly in favor of defendant upon the allegations contained in the first amended declaration, upon which the case was really tried. The judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

(Not to be reported in full)

down the street.

The witnesses on the part of appellant testified that they did not know what scared the horse. It will [illegible] that there was no proof whatever tending to sustain the charge of the last mentioned declaration, that the [illegible] of appellant on the pole carelessly, negligently and [illegible] dropped or threw the end of the rope to the ground and frightened the horse, thereby causing him to run away, and the verdict and judgment based upon the proof which was introduced, cannot be sustained. We may also state that in our opinion the weight of the evidence was clearly in favor of defendant upon the allegations contained in the first amended declaration, upon which the case was really tried. The judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

(Not to be reported in full)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

Clerk of the Appellate Court.

OPINION

Fee $

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 27th *— day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Waddell

vs.

No. 34

March Term, 1914.

Moser

~~ERROR TO~~
APPEAL FROM

188 I.A. 302

Circuit COURT

Randolph COUNTY

TRIAL JUDGE

Hon. Geo. A. Crow

Term No. 32. Agenda No. 25.

March Term, A. D. 1914.

Robert A. Waddell, Appellee, vs. John A. Noser, Appellant.	Appeal from Randolph.

Opinion by Higbee, P.J.

This was a suit brought by Robert A. Waddell, appellee, to recover a broker's commission for the sale of real estate owned by appellant. The declaration was composed of two of the common counts, one for money laid out and expended and the other for work, labor and services rendered by appellee in and about effecting a sale of said property. There was a plea of general issue and a judgment upon the verdict of the jury for $329.00. Appellant insists the judgment should not be permitted to stand on account of prejudicial error committed by the court in excluding certain evidence and in instructing the jury.

The proofs show that appellant owned a flouring mill and some vacant real estate at Rockwood, Illinois, and desiring to exchange it for other property, employed appellee to find him a satisfactory exchange. Appellee who did business in St. Louis sent for appellant and introduced him to a Mr. Rowden, who had three houses in that city he was willing to exchange for the property. After appellant inspected the houses he and Rowden went to Rockwood so that the latter could look over appellant's property. Rowden then informed appellant that his houses in St. Louis were covered by mortgages and further negotiations were thereupon discontinued and Rowden went to the railroad station to take a train back to St. Louis. Before Rowden could

Term No. 32. Agenda No. 26.

March Term, A. D. 1914.

Robert A. Waddell, Appellee, vs. John A. Moser, Appellant.	Appeal from Randolph.

Opinion by Higbee, P.J.

This was a suit brought by Robert A. Waddell, appellee, to recover a broker's commission for the sale of real estate owned by appellant. The declaration was composed of two of the common counts, one for money laid out and expended and the other for work, labor and services rendered by appellee in and about effecting a sale of said property. There was a plea of general issue and a judgment upon the verdict of the jury for $329.00. Appellant insists the judgment should not be reversed to stand on account of prejudicial error committed by the court in excluding certain evidence and in instructing the jury.

The proofs show that appellant owned a flourishing mill and some vacant real estate at Rockwood, Illinois, and desiring to exchange it for other property, employed appellee to find him a satisfactory exchange. Appellee who did business in St.Louis sent for appellant and introduced him to a Mr. Bowden, who had three houses in that city he was willing to exchange for the property. After appellant inspected the houses he and Bowden went to Rockwood so that the latter could look over appellant's property. Bowden then informed appellant that his houses in St. Louis were covered by mortgages and further negotiations were thereupon discontinued and Bowden went to the railroad station to take a train back to St. Louis. Before Bowden could

get a train, appellant went to the station and made a contract with him to trade his mill for one of the St. Louis houses. Rowden took the mill at a valuation of $6,700.00, and in payment therefor appellant took one of the St. Louis houses valued at $9,000.00, subject to an incumbrance of $3,800.00 leaving an equity therein of $5,200.00, and a mortgage back on the mill for $1,500.00, making in all $6,700.00.

Appellant contends that his agreement with appellee was to pay $500.00 commission if appellee would procure $10,000.00 in cash for his property or would get for him in exchange St. Louis property, which would bring him an income of ten per cent. annually on that amount, while appellee swore that appellant promised to give him five per cent on the dollar on any trade or sale he should make for the mill at Rockwood or his whole property. The amount of the judgment was five per cent of the valuation of the equity of the St. Louis property, $6,700.00, less a payment of $6.00 for which appellee gave appellant credit. Certain letters of appellant and the testimony of certain witnesses introduced on behalf of appellee, which tended to support his claim that he was to have five per cent commission for effecting the sale or exchange of appellant's property, would justify a jury in finding that such was the contract. The theory of the defense is first, that appellee did not fulfil his contract to find appellant a buyer or a trade for the amount of consideration agreed upon; second, that the original negotiations were abandoned and a new trade consummated entirely different from the original for which appellee was not entitled to any commission, because he was not the efficient cause of the consummation of the same; and third, that as appellee had not carried out the special contract between the parties, he was

get a train, appellant went to the station and made a contract with him to trade his mill for one of the St. Louis houses. Rowden took the mill at a valuation of $6,700.00, and in payment therefor appellant took one of the St. Louis houses valued at $9,000.00, subject to an incumbrance of $3,800.00 leaving an equity therein of $5,200.00, and a mortgage back on the mill for $1,500.00, making in all $6,700.00.

Appellant contends that his agreement with appellee was to pay $500.00 commission if appellee would procure $10,000.00 in cash for his property or would get for him in exchange St. Louis property, which would bring him an income of ten per cent. annually on that amount, while appellee swore that appellant promised to give him five per cent on the dollar on any trade or sale he should make for the mill at Rockwood or his whole property. The amount of the judgment was five per cent of the valuation of the equity of the St. Louis property, $6,700.00, less a payment of $6.00 for which appellee gave appellant credit. Certain letters of appellant and the testimony of certain witnesses introduced on behalf of appellee, which tended to support his claim that he was to have five per cent commission for effecting the sale or exchange of appellant's property, would justify a jury in finding that such was the contract. The theory of the defense is first, that appellee did not fulfill the contract to find appellant a buyer or a trade for the amount of consideration agreed upon; second, that the original negotiations were abandoned and a new trade consummated entirely different from the original for which appellee was not entitled to any commission, because he was not the efficient cause of the consummation of the same; and third, that as appellee had not carried out the special contract between the parties, he was

entitled only to what his services were reasonably worth under a quantum meruit.

Upon the trial the court refused to permit evidence offered by appellant, concerning the actual value of the St.Louis property given in exchange for the Rockwood mill and also refused an instruction tendered by appellant, which told the jury that if they believed from the evidence the contract for the sale or exchange of the property between Noser and Rowden was wholly different from that contemplated by the contract between Waddell and Noser, then Waddell was not entitled to recover the commissions on the contract as originally made. The theory of this instruction appears to have been that appellee, if entitled to recover at all, could recover only on a quantum meruit for his services. Whether or not the court properly excluded evidence concerning the actual value of the St.Louis property, depends upon whether the commission, if any, which appellee was entitled to recover, should be calculated upon the value placed upon that property by the parties to the trade or upon the value ~~xxxxx~~ it might be proved to be worth upon the trial. We are inclined to think that for the purpose of calculating the commission, the property must be assumed to be worth the value placed upon it by both parties to the trade at the time the contract was consummated. Had appellant's property been sold for cash there can be no question but that if appellee was entitled to a commission, it would have been at the rate of five per cent upon the amount of the sale, and when appellant instead of cash, received property in exchange which he, as well as the owner thereof, valued in making the trade at a certain amount, he, for the purpose of estimating commissions,

entitled only to what his services were reasonably worth, under a quantum meruit.

Upon the trial the court refused to permit evidence offered by appellant, concerning the actual value of the St.Louis property given in exchange for the Rockwood mill and also refused an instruction tendered by appellant, which told the jury that if they believed from the evidence the contract for the sale or exchange of the property between Moser and Howden was wholly different from that contemplated by the contract between Waddell and Moser, then Waddell was not entitled to recover the commissions on the contract as originally made. The theory of this instruction appears to have been that appellee, if entitled to recover at all, could recover only on a quantum meruit for his services. Whether or not the court properly excluded evidence concerning the actual value of the St.Louis property, depends upon whether the commission, if any, which appellee was entitled to recover, should be calculated upon the value placed upon that property by the parties to the trade or upon the value ~~fixed~~ it might be proved to be worth upon the trial. We are inclined to think that for the purpose of calculating the commission, the property must be assumed to be worth the value placed upon it by both parties to the trade at the time the contract was consummated. Had appellant's property been sold for cash there can be no question but that if appellee was entitled to a commission, it would have been at the rate of five per cent upon the amount of the sale, and appellant instead of cash, received property in exchange which he, as well as the owner thereof, valued in making the trade at a certain amount, he, for the purpose of estimating commissions,

must be bound by the valuation he as well asthe owner, fixed upon the property received by him.

Appellee did not seek to recover an a quantum meruit for his services but relied upon his express contract with appellant for a percentage commission. While the trade was not consummated in identically the manner contemplated by the contract between appellant and appellee nor according to the original terms talked of by appellee and Rowden, yet it was consummated along the lines talked of and discussed by Rowden with appellant and appellee, and there was no such departure from those lines as to warrant a change in the manner of computing the commission for that intended by the original terms of the employment of appellee to make the sale. A ppellant relies on Close v. Browne, 230 Ill., 228, which holds, that where the transaction in regard to the sale of the land is wholly different from the one contemplated by the parties when the contract was made, there can be no recovery upon the contract, but that if the principal received the benefit of the agent's services rendered at the instance of the principal, he is liable upon a quantum meruit. But that rule cannot apply to this case as the disposition of the property was not wholly different from that contemplated by the contract between appellant and appellee but on the contrary was directly upon the line indicated by the terms of the employment. We are therefore of opinion that the court properly refused appellant's instruction above referred to.

Complaint is also made of the refusal of instructions No. 3 and 4 offered by appellant. Refused instruction No. 3 laid down a rule of law to govern the jury in case they found that the negotiations ~~xfx~~ for the exchange of the properties of

must be bound by the valuation he as well as the owner, fixed upon the property received by him.

Appellee did not seek to recover on a quantum meruit for his services but relied upon his express contract with appellant for a percentage commission. While the trade was not consummated in identically the manner contemplated by the contract between appellant and appellee nor according to the original terms talked of by appellee and Howden, yet it was consummated along the lines talked of and discussed by Howden with appellant and appellee, and there was no such departure from those lines as to warrant a change in the manner of computing the commission for that intended by the original terms of the employment of appellee to make the sale. A ppellant relies on Chase v. Browne, 230 Ill., 228, which holds, that where the transaction in regard to the sale of the land is wholly different from the one contemplated by the parties when the contract was made, there can be no recovery upon the contract, but that if the principal received the benefit of the agent's services rendered at the instance of the principal, he is liable upon a quantum meruit. But that rule cannot apply to this case as the disposition of the property was not wholly different from that contemplated by the contract between appellant and appellee yet on the contrary was directly upon the line indicated by the terms of the employment. We are therefore of opinion that the court properly refused appellant's instruction above referred to.

Complaint is also made of the refusal of instructions no. 3 and 4 offered by appellant. Refused instruction no. 3 laid down a rule of law to govern the jury in case they found that the negotiations xxx for the exchange of the properties of

Noser and Rowden had been abandoned by both parties in good faith. This instruction was improper for the reason that there was no proof of any abandonment of negotiations between said parties. "The mere fact that negotiations may have been discontinued for a short time, will not defeat a recovery. In order to constitute an abandonment the evidence must not only show the breaking off of the negotiations, but also an abandonment of all intention by the purchaser of purchasing the property." Rasar v. Spurling 176 Ill. App., 349.

The fourth refused instruction told the jury, that a person employed to make a sale of property is not entitled to commission where he is not the efficient cause of the consummation of the transaction, for which the recovery of commission is sought. This instruction, if given, might have been misleading in this case as tending to cause the jury to believe that plaintiff was not entitled to recover unless he had directly brought about the trade exactly as it was consummated, which is not the law. The theory that before appellee could recover, it had to be shown by the proofs that he brought the defendant and Rowden together and that the result thereof, was the making of the trade in question, was fully covered by other instructions in the case. Upon the whole case we are satisfied that substantial justice has been done and as there are no errors of sufficient materiality to warrant a reversal the judgment will be affirmed.

Affirmed.

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(Not to be published in full.)

Moser and Howden had been abandoned by both parties in good faith. This instruction was improper for the reason that there was no proof of any abandonment of negotiations between said parties. "The mere fact that negotiations may have been discontinued for a short time, will not defeat a recovery. In order to constitute an abandonment the evidence must not only show the breaking off of the negotiations, but also an abandonment of all intention by the purchaser of purchasing the property." Hacar v. Spurling 176 Ill. App., 549.

The fourth refused instruction told the jury, that a person employed to make a sale of property is not entitled to commission where he is not the efficient cause of the consummation of the transaction, for which the recovery of commission is sought. This instruction, if given, might have been misleading in this case as tending to cause the jury to believe that plaintiff was not entitled to recover unless he had directly brought about the trade exactly as it was consummated, which is not the law. The theory that before appellee could recover, it had to be shown by the proofs that he brought the defendant and Howden together and that the result thereof, was the making of the trade in question, was fully covered by other instructions in the case. Upon the whole case we are satisfied that substantial justice has been done and as there are no errors of sufficient materiality to warrant a reversal the judgment will be affirmed.

Affirmed.

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(Not to be published in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

Clerk of the Appellate Court.

OPINION

Fee $ .....

1292 / 45

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Jeffries

vs.

No. 40

March Term, 1914.

Alexander et al

~~ERROR TO~~
APPEAL FROM

188 I.A. 310

Circuit COURT

Marion COUNTY

TRIAL JUDGE

Hon. J. C. McBride

Term No. 40. Agenda No. 12.

March Term A.D.1914.

Ida Jefferies, Appellee,	)	
v.	)	Appeal from Marion.
A. J. Alexander, et al, Appellants.	)	

188 I.A. 310

Opinion by Higbee, P.J.

This was a suit under the dram shop act brought by Ida Jeffries, appellee, to recover damages on account of the death of her husband, against A.J.Alexander, L.T.Yarmier, Edward E.Kell and August Langenfeld, appellants, and several others who were either found not guilty or dismissed out of the suit.

The declaration contained two counts, the first of which set out the marriage of appellee to Newton Jeffries, August 22,1908 and alleged that at that time he was working for the Marion County Coal Company, for $50 a month and was also receiving an income in the nature of a life estate, amounting to $37 a month; that by reason of the amount so received by him he was enabled to and did provide a comfortable and liberal maintenance for himself and plaintiff; that commencing about December 1,1908 and ondivers days and times from thence until the death of said Newton Jefferies, on February 2,1913, the defendants and each of them from time to time, sold and gave him intoxicating liquors, causing in whole or in part his intoxication; that he thereby became habitually intoxicated and in consequence lost his position, wasted his salary, squander-

Term No. 40. Agenda No. 72.

March Term A.D.1914.

Ida Jefferies, Appellee, v. A. J. Alexander, et al, Appellants.	Appeal from Marion.

Opinion by Higbee, P.J.

This was a suit under the dram shop act brought by Ida Jefferies, appellee, to recover damages on account of the death of her husband, against A.J.Alexander,L.T.Sammier, Edward K.Hall and August Langenfeld, appellants,and several others who were either found not guilty or dismissed out of the suit.

The declaration contained two counts, the first of which set out the marriage of appellee to Newton Jefferies, August 22,1908 and alleged that at that time he was working for the Marion County Coal Company,for $60 a month and was also receiving an income in the nature of a life estate,amounting to $37 a month;that by reason of the amount so received by him he was enabled to and did provide a comfortable and liberal maintenance for himself and plaintiff; that commencing about December 1,1908 and ondiverse days and times from thence until the death of said Newton Jefferies, on February 2,1910, the defendants and each of them from time to time, said and gave him intoxicating liquors, causing in whole or in part his intoxication;that he thereby became habitually intoxicated and in consequence lost his position, wasted his salary, squandered

ed his money and property, became greatly impoverished, became degraded and wholly ruined in body and mind, and by reason thereof ceased to exercise or attend to his duties or business or to earn or provide a livelihood for himself or plaintiff; that he became continuously intoxicated and afflicted with delirium tremens and by reason thereof became ill and afterwards on the day aforesaid, in consequence of such habitual intoxication he died; that appellee served notice upon each of the defendants they being licensed dram shop keepers, not to sell or give her husband intoxicating liquors but they persisted in so doing and by reason thereof, appellee has been deprived of her means of support.

The second count was similar to the first, except that it alleges the death of said Jefferies was caused by delirium tremens, resulting from intoxication brought about in whole or in part by the intoxicating liquor furnished him by the defendants. There was a plea of the general issue and a judgment and verdict in favor of appellee for $1000.

The record shows fourteen assignments of errors by appellant, which in different ways allege that the proof did not sustain the verdict, that the court erred in its rulings in regard to the evidence, that an improper instruction was given on behalf of appellee and that one of the counsel for appellee made improper and prejudicial remarks in his address to the jury.

The proofs upon which appellee based her right of recovery were in substance as follows: For two or three years prior to his marriage to appellee, Newton Jefferies, while occasionally indulging in the use of intoxicating liquors, did not do so to excess, and at the time of his marriage he held

ed his money and property, became greatly impoverished, reduced, degraded and wholly ruined in body and mind, and by reason thereof ceased to exercise or attend to his duties or business so to earn or provide a livelihood for himself or plaintiff; that he became continuously intoxicated and afflicted with delirium tremens and by reason thereof became ill and afterwards on the day aforesaid, in consequence of such habitual intoxication he died; that appellee served notice upon each of the defendants they being licensed duly keepers, not to sell or give her husband intoxicating liquors but they permitted in so doing, and by reason thereof, appellee has been deprived of her means of support.

The second count was similar to the first, except that it alleges the death of said defendes was caused by delirium tremens, resulting from intoxication brought about in whole or in part by the intoxicating liquor furnished him by the defendants. There was a plea of the general issue and a judgment and verdict in favor of appellee for $1000.

The record shows fourteen assignments of errors by appellant, which in different ways allege that the court did not sustain the verdict, that the court erred in its rulings in regard to the evidence, that an improper instruction was given on behalf of appellee and that one of the counsel for appellee made improper and prejudicial remarks in his address to the jury.

The proofs upon which appellee based her right of recovery were in substance as follows: Her son or three years prior to his marriage to appellee, months defendes, while occasionally indulging in the use of intoxicating liquors, did not do so to excess, and at the time of his marriage he had

a position as weighman for a Coal Mining Company at $40 a month. About that time his foster mother died, having made a provision for him in her will for the life use of a fund which paid him $37 a month. Two or three months later he began drinking heavily and in January, 1909 lost his position. From that time on until his death he was out of employment and habitually intoxicated. During this time he and his wife were dependant for their livelihood upon the $37 received each month from the foster mother's estate. It was clearly shown and does not appear to be seriously disputed that at different times he received and drank intoxicating liquors purchased by him from the several appellants. On Tuesday night previous to his death he came home intoxicated, His clothes were dirty, his hat mashed in, he was unable to talk, and was so drunk that his step daughter had to put him to bed. He never left the house after that time and was out of his bed only for a short period on Wednesday. On Thursday he was worse and became delirious. He thought that people were pursuing him and that snakes and dogs were trying to get him. He said there was money he wanted to get and kept picking at the mattress and sticking things under his underwear. He tried to get out of his bed and finally to detain him there, the step daughter got a rope and tied him. He grew suddenly worse and died the following Sunday afternoon.

It is one of the contentions of appellant that there could be no recovery for the reason that the declaration charges that Jefferies died of delirium tremens brought about by his habitual intoxication, but that there was no evidence tending to show that he died of delirium tremens. There was in fact evidence tending to show that Jefferies was afflicted with delirium tremens, though it was not positive upon that question and the physician who attended him said Jefferies had

a position as weighman for a coal mining company at $40 a month. About that time his foster mother died, having made a provision for him in her will for the life use of a $40 annuity paid him $37 a month. Two or three months later he began drinking heavily and in January, 1909 lost his position. From that time on until his death he was out of employment and habitually intoxicated. During this time he and his wife were dependent for their livelihood upon the $37 received each month from the foster mother's estate. It was clearly shown and does not appear to be seriously disputed that at different times he received and drank intoxicating liquors purchased by him from the several appellants. On Tuesday night previous to his death he came home intoxicated. His clothes were dirty, his hat washed in, he was unable to talk, and was so drunk that his step daughter had to put him to bed. He never left the house after that time and was out of his bed only for a short period on Wednesday. On Thursday he was worse and became delirious. He thought that people were pursuing him and that snakes and were trying to get him. He said there was money he wanted to get and kept picking at the mattress and stripping things under his underwear. He tried to get out of his bed and finally he detain him there, the step daughter got a rope and tied him. He grew suddenly worse and died the following Sunday afternoon.

It is one of the contentions of appellant that there could be no recovery for the reason that the declaration claimed that Jefferies died of delirium tremens brought about by his habitual intoxication, but that there was no evidence tending to show that he died of delirium tremens. There was in fact evidence tending to show that Jefferies was affected with delirium tremens, though it was not positive sign that [illegible] and the physician who attended him said [illegible]

erysipelas and that he was unable to say whether the patient was or was not suffering with delirium tremens. That Jefferies was in a highly delerious state and was seeing sights and doing things commonly supposed to attend an attack of delirium tremens is undisputed; that this condition and his subsequent death resulted from his habitual intoxication, caused in whole or in part by liquor sold him by appellant and that appellee was thereby injured in her means of support, was clearly proven. It appears to us that under these conditions, it is not material whether the delirium from which he suffered was properly named in the declaration as delirium tremens or not. The proofs plainly showed a case which entitled appellee to recover.

Upon the trial appellant offered in evidence the marriage record of the county of Marion, showing a former marriage of Jefferies prior to the time he married appellee and proof was also offered to show that his former wife was still living. A decree of divorce entered in the circuit court of said county at the April term thereof, 1898 in a suit brought by Jefferies by his former wife, was also offered, but objection was sustained by the court to all the proof offered concerning the former marriage and the existence of Jefferies former wife. The decree referred to failed to state that the complainant in that suit, Laura . . Jefferies, was a resident of Marion county and was offered by appellants for the purpose of showing that the court was without jurisdiction and therefore the decree of divorce was void, and that the first wife of Jefferies was really his present legal wife. This evidence was excluded by the trial court for the reason that the decree of divorce could not be collaterally attacked as was sought to be done in this suit and appellants claim that this ruling was an error. To sustain their [illegible]

argument and that he was unable to say whether the petitioner was or was not suffering with delirium tremens. That petitioner was in a highly delerious state and was seeing sights and doing things commonly supposed to attend an attack of delirium tremens is undisputed; that this condition and his subsequent deterioration from his habitual intoxication, caused in whole or in part by liquor sold him by appellant and that appellee was thereby injured in her means of support, was clearly proven. It appears to us that under these conditions, it is not material whether the delirium from which he suffered was properly named in the declaration as delirium tremens or not. The proofs plainly show a case which entitled appellee to recover.

Upon the trial appellant offered in evidence the marriage record of the county of Barton, showing a former marriage of Jefferies prior to the time he married appellee and proof was also offered to show that his former wife was still living. A decree of divorce entered in the circuit court of said county at the April term thereof, 1898 in a suit brought by Jefferies by his former wife, was also offered, but objection was sustained by the court to all the proof offered concerning the former marriage and the existence of Jefferies former wife. The decree recited to failed to state that the complainant in that suit, namely Jefferies, was a resident of Barton county and was offered by appellants for the purpose of showing that the court was without jurisdiction and therefore the decree of divorce was void, and that the first wife of Jefferies was really his present legal wife. This evidence was excluded by the trial court for the reason that the decree of divorce could not be collaterally attacked as was sought to be done in this suit and appellants claim that this ruling was an error. To sustain their contention

appellant relied on Becklenberg, v. Becklenberg 254 Ill.198 and Garrett v.Garrett 252 Ill.318, where the question of the materiality of the residence of the complainant in a divorce suit was under consideration. These cases are not in point however as the question there determined was that the jurisdiction of the trial court in a divorce suit might be raised for the first time on appeal or writ of error, although it had not been considered in the trial court. The decrees in those cases were directly attacked in the same cases in which they were entered and the question of a collateral attack in another suit was not considered. In the case of Cassell v. Joseph 184 Ill.378, the validity of a deed executed by the administrators of an estate was attacked collaterally for the reason that a decree of the county court directing the administrators to sell the property, failed to show service of process upon certain necessary parties, it being claimed that the county court was therefore without jurisdiction. It is there said "It is well settled that a court of general jurisdiction,acting within the scope of its authority, is presumed to have jurisdiction to render the judgment or decree it pronounces,until the contrary appears..... The principle, that presumptions will be entertained in favor of the juriddiction of courts of general jurisdiction has been applied to cases where the decree is silent as to the services of process upon the defendants. In Swearengen v. Gulick 67 Ill. 208, we said, 'Where the record of a judgment or decree is relied on collaterally, jurisdiction must be presumed in favor of a court of general jurisdiction, although it be not alleged or failedto appear in the record'. In benefield v. Albert 104 Ill, 665, we said'Where a decree is called in question collaterally, as is the case here, it may be regarded as a general rule, that in all courts of general jurisdiction nothing is presumed

appellant relies on Beckenberg, v. Beckenberg 276 Ill.120 and Garrett v.Garrett 288 Ill.318, where the question of the validity of the residence of the complainant in a divorce suit was under consideration. These cases are not in point however as the question there determined was that the jurisdiction of the trial court in a divorce suit might be raised for the first time on appeal or writ of error, although it had not been considered in the trial court. The decrees in these cases were directly attacked in the same cases in which they were entered and the question of a collateral attack in another suit was not considered. In the case of Cassell v. Joseph 184 Ill.376, the validity of a deed executed by the administrators of an estate was attacked collaterally for the reason that a decree of the county court directing the administrators to sell the property, failed to show service of process upon certain necessary parties, it being claimed that the county court was therefore without jurisdiction. It is there said "It is well settled that a court of general jurisdiction,acting within the scope of its authority, is presumed to have jurisdiction to render the judgment or decree it pronounces,until the contrary appears..... The principle, that presumptions will be entertained in favor of the jurisdiction of courts of general jurisdiction has been applied to cases where the decree is silent as to the service of process upon the defendants. In Greenegen v. Gulick 87 Ill. 208, we said, 'Where the record of a judgment or decree is silent, jurisdiction will be presumed in favor of courts of general jurisdiction, although it be not alleged or failed to appear in the record'. In Benedict v. Ilsley 114 Ill. 665, we said'Where a decree is called in question collaterally, as is the case here, it may be regarded as a general rule that in all courts of general jurisdiction nothing is presumed

to be out of their jurisdiction but what specially appears to be so; but on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged. In the case cited it was also held that where the decree was silent as to the jurisdiction of the court over the defendants, in the absence of evidence showing that jurisdiction was not acquired, it would be presumed that the court had jurisdiction ' ".

The decree offered in evidence in this case showed that the complainant had resided in the State of Illinois for a year prior thereto, but as it failed to show what county she resided in, it was therefore silent as to the jurisdiction of the court over the complainant and her cause in that respect, but under the authority above quoted, the decree could not be collaterally attacked; and the court did not err in refusing to admit the decree and the other proof in connection therewith.

Complaint is made by appellants of the giving of appellee's second instruction, which was as follows: "The court instructs the jury that the statutes of this state provide as follows: 'Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons, who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons, shall be liable, severally and jointly, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring such suit to control the same and the amount recovered, as a femme sole.' The objections to this instruction made by appellant, are that while it purports to be a copy of the statute it does not con-

to be out of their jurisdiction but what specifically appears to be so; but on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged. In the case cited it was also held that where the decree was silent as to the jurisdiction of the court over the defendants, in the absence of evidence showing that jurisdiction was not acquired, it would be presumed that the court had jurisdiction ".

The decree offered in evidence in this case showed that the complainant had resided in the State of Illinois for a year prior thereto, but as it failed to show what county she resided in, it was therefore silent as to the jurisdiction of the court over the complainant and her cause in that respect, but under the authority above quoted, the decree could not be collaterally attacked; and the court did not err in refusing to admit the decree and the other proof in connection therewith.

Complaint is made by appellants of the giving of appellee's second instruction, which was as follows: "The court instructs the jury that the statutes of this state provide as follows: 'Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons, who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons, shall be liable, severally and jointly, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suit and to control the same and the amount recovered, as a feme sole.' The objections to this instruction rest, in appellant's brief, while it purports to be a copy of the statute it does not

the same in full; that it is an abstract proposition of law, containing no reference to the case or evidence, and does not require proof of facts which would create liability. The instruction appears to us to state all of the statute that was applicable to this case and the portions left out were immaterial here and could not have aided in informing the jury as to the law which should govern them in reaching a verdict. Appellants refer to the case of Hapenny v.Huffman, recently decided by the Appellate Court of the Third District of this state at its October term and not yet reported, where it is claimed that a similar instruction was held to be reversible error. It appears however that the instruction criticised in that case omitted a material part of the statute which is included in the instruction in the case we have under consideration and therefore the same objection would not apply. It is said in that opinion,"The instruction as given is misleading since it tells the jury appellee was entitled to recover all damages sustained and is not limited to damages sustained to her means of support;.....The giving of this abstract instruction was reversible error when the record shows no instruction was given limiting the damages to the loss of her means of support or informing the jury what was the proper measure of damages in the case." Numerous instructions in the case before us limit the damages to injury sustained by appellee in her means of support, and appellee's instruction No. 12 in particular, clearly defined the measure of damages and limited the same to injury to appellee's means of support, so that the criticism referred to as applicable to the instruction in the above case does not apply to the instruction here.

the case in toto; that it is an abstract proposition of law, containing no reference to the case or evidence, and does not require proof of facts which would create liability. The instruction appears to be to state all of the abstract law applicable to this case and the portions left out were immaterial here and could not have aided in informing the jury as to the law which should govern them in rendering a verdict. Appellants refer to the case of Hapeny v.Mullen, recently decided by the Appellate Court of the Third District of this state at its October term and not yet reported, where it is claimed that a similar instruction was held to be reversible error. It appears however that the instruction criticised in that case omitted a material part of the statute which is included in the instruction in the case we have under consideration and therefore the same objection would not apply. It is said in that opinion,"The instruction as given is misleading since it tells the jury appellee was entitled to recover all damages sustained and is not limited to damages material to her means of support;.....The giving of this abstract instruction was reversible error when the record shows no instruction was given limiting the damages to the loss of her means of support or informing the jury what was the proper measure of damages in the case." Numerous instructions in the case before us limit the damages to injury sustained by appellee in her means of support, and appellee's instruction No. 12 in particular, clearly defined the measure of damages and limited the case to injury to appellee's means of support, so that the criticism referred to as applicable to the instruction in the above case does not apply to the instruction here.

The jury could not have been misled by this instruction and the court did not err in giving it.

It is further claimed by appellants that an attorney for appellee made improper and prejudicial remarks in his argument to the jury. It is difficult to learn from the record whether objections were made in apt time to the remarks complained of and whether proper exceptions were preserved to the ruling of the court thereon. But at any rate the remarks, while uncalled for and in a measure improper, were not of such material importance as to warrant a reversal of the judgment.

The judgment of the court below will be affirmed.

Affirmed.

****

(Not to be reported in full)

Mc Bride J. having tried this case in the court below took no part here.

The jury could not have been misled by this instruction and the court did not err in giving it.

It is further claimed by appellants that an attorney for appellee made improper and prejudicial remarks in his argument to the jury. It is difficult to learn from the record whether objections were made in apt time to the remarks complained of and whether proper exceptions were preserved to the ruling of the court thereon. But at any rate the remarks, which are called for and in a measure improper, were not of such material importance as to warrant a reversal of the judgment.

The judgment of the court below will be affirmed.

Affirmed.

****

(Not to be reported in full)

Mr Bride J. having tried this case in the court below took no part here.

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

A 312

(273) ~~1239~~

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Hahn

vs.

No. 43

March Term, 1914.

Schnell

~~ERROR TO~~
APPEAL FROM

188 I.A. 312

Circuit COURT

Clinton COUNTY

TRIAL JUDGE

Hon. A. M. Rose

Term No. 43. Agenda No. 72.

March Term A.D.1914.

Charles J.Hahn, Appellee.	
V.	Appeal from Clinton.
Pauline Schnell, Appellant.	

188 I.A. 312

Opinion by Higbee, P.J.

The declaration in this suit was in trespass and charged Carlyle Schnell and Pauline Schnell with turning on the dwelling house of appellee Charles J.Hahn and into the open doors and windows thereof a large stream of water, with great force and violence, thereby injuring appellee, disturbing his peace of mind and damaging his property. There was a plea of not guilty and a verdict in favor of appellee for $900, followed by a judgment for a like amount. From this judgment Pauline Schnell alone appeals, claiming that the proofs failed to show she was in any way connected witht the offence complained of, that there was manifest error in appellee's third given instruction and in the courts ruling in regard to certain evidence, that the defendant Carlyle Schnell was guilty of the offense charged, was not denied, but upon the question whether appellant, who is his mother, was also guilty, there was a sharp conflict in the evidence.

The proofs produced on the trial show that appellant formerly and for many years lived in the city of Carlyle, Illinois and that she owned a house and lot in that place, but that for

Term No. 42. Agenda No. 71.

March Term A.D.1924.

Charles G.Hein,
Appellee.
v.
Pauline Schmeil,
Appellant.

Appeal from Linton.

188LA,312

Opinion by Higbee, P.J.

The declaration in this suit was in trespass and charged Carlyle Schmeil and Pauline Schmeil with turning on the Appellee's house of appellee Charles G.Hein and into theopen doors and windows thereof a large stream of water, with great force and violence, thereby injuring appellee, disturbing his peace of mind and damaging his property. There was a plea of not guilty and a verdict in favor of appellee for $500, followed by a judgment for a like amount. From this judgment Pauline Schmeil alone appeals, claiming that the proofs failed to show she was in any way connected with the offence complained of, that there was manifest error in appellee's third given instruct n and in the courts ruling in regard to certain evidence, that the defendant Carlyle Schmeil was guilty of the offence charged, was not denied, but upon the question whether appellant, who is his mother, was also guilty, there was a sharp conflict in the evidence.

The proofs produced on the trial show that appellant formerly and for many years lived in the city of Carlyle, Illinois and that she owned a house and lot in that place, and that her

the last thirteen years she lived in St.Louis Missouri, visiting Carlyle from time to time; that in 1905 or 1906 she rented her house in Carlyle to appellee. There was no trouble between the parties to the leasing until about the first of the year 1911, when appellee in paying his rent, deducted $8.10 therefrom on account of repairs. Carlyle Schnell, the son, who appears to have been attending to the business for his mother refused to accept the amount proposed to be paid by appellee and caused suit to be brought in forcible detainer before a justice of the peace for possession of the property. Appellee did not appear before the justice of the peace and judgment was entered against him. He however, appealed the case to the circuit court and afterwards, in June, 1911, while the case was pending, the matter was adjusted by appellant accepting the amount tendered. The lease was then continued as before, appellee paying his rent quarterly by special delivery letters. There appears to have been no further difficulty between the parties until the night of June 26, 1912. About a month before this appellant had come from St.Louis to Carlyle and, as was her custom stopped at the Truesdail Hotel, which was at the northeast corner of the court house square. The premises leased to appellee were some six or seven blocks west of the southwest corner of the square. The day previous to this date Carlyle Schnell, who lived somewhere in Missouri, came to Carlyle and on the night in question, had a conversation with Lewis Hade and Tom Thalls about a little job he wanted done. Hade said that Schnell "was talking about giving Mr. Hahnn a little scare or something about going up there. Said he had a little job he wanted done". They went into a saloon where

the last thirteen years she lived in St.Louis Missouri, visiting Carlyle from time to time; that in 1908 or 1909 she moved her home to Carlyle to stay. There was no trouble between the parties to the lease until about the first of the year 1911, when appellee in paying his rent, deducted $5.00 therefrom on account of repairs. Carlyle himself, the lessor, appears to have been attending to the business for his mother, refused to accept the amount proposed to be paid by appellee and caused suit to be brought in forcible entainer before a justice of the peace for possession of the property. Appellee did not appear before the justice of the peace and judgment was entered against him. He however, appealed the case to the circuit court and afterwards, in June,1911,while the case was pending, the matter was adjusted by appellant accepting the amount tendered. The lease was then continued as before. appellee paying his rent quarterly by special delivery letter. There appears to have been no further difficulty between the parties until the night of June 16,1912. About a month before this appellant had come from St.Louis to Carlyle and, as he testifies, stopped at the Tremont Hotel. Which was at the northeast corner of the court house square. The premises leased to appellee were some six or seven blocks west of the northwest corner of the square. The day previous to this date Carlyle Sommell,who lived somewhere in Missouri,came to Carlyle and on the night in question,had a conversation with Carl Clark and Tom Thalle about a little job he wanted done. Clark said that Sommell "was talking about giving Mr. Fahnn a little scare or something about going up there. Said he had a little job he wanted done". They went into a saloon where

Schnell treated to drinks with beer and whisky several times and he also had two pint bottles of whiskey which the men afterwards drank. It was agreed by Shade and Thalls that they would "take the chance" of carrying out Schnell's suggestion.

On this night appellee occupied the house with his wife and two small children, he sleeping in the north room of the second floor, while she and the children slept in the south room. The night was warm and the family had retired about half past ten o'clock, leaving the windows open. About this time or a little later the three men went to the city hose house, procured some hose which they took for some distance and attached to a city hydrant diagonally across the street from the house where Hahn resided. Schnell and Thalls took the other end of the hose across into the Hahn yard and then notified Shade at the hydrant to turn on the water, which he did. The two men in charge of the hose then directed it towards the windows of Mrs. Hahn's room and a stream of dirty water was thrown through the window into the room drenching Mrs. Hahn and the children and greatly damaging the contents of the room. Mrs. Hahn rushed into her husband's room and the two men carried the hose around the house and began throwing the stream into that room. Appellee perceiving where the water was coming from ran into his bedroom, got a revolver and fired three shots towards them, one of which struck Thalls in the ankle, inflicting a wound from which he died the following day.

That an atrocious and inexcusable offense was committed by the three men against the public laws and the rights of appellee and his family, is freely admitted by all concerned and the guilt of the three men is not here in dispute, but the sole question on the facts which arises here is whether the evidence

Sommell treated to drinks with beer and whisky, several times and he also had two pint bottles of whisky which the men afterwards drank. It was agreed by Thelle and Sommell that they would "take the chance" of carrying out [illegible] tion.

On this night appellee occupied the house with her husband and two small children, he sleeping in the north room on the second floor, while she and the children slept in the south room. The night was warm and the family had retired shortly past ten o'clock, leaving the windows open. About this time or a little later the three men went to the city hose house, procured some hose which they took for some distance and attached to a city hydrant diagonally across the street from the house where Hahn resided. Sommell and Thelle took the other end of the hose across into the Hahn yard and then notified [illegible] the hydrant to turn on the water, which he did. The two men in charge of the hose then directed it towards the windows of Hahn's room and a stream of dirty water was thrown through the window into the room drenching [illegible] and the furniture and greatly damaging the contents of the room. Mrs. Hahn crawled into her husband's room and the two men carried the hose around the house and began throwing the stream into that room, appellee perceiving where the water was coming, from her bed in her room, got a revolver and fired three shots towards the men, one of which struck Thelle in the ankle, inflicting a wound from which he died the following day.

That an atrocious and inexcusable offense has been committed by the three men against the public laws and the highest [illegible] and his family, is freely admitted by all concerned and the guilt of the three men is not here in dispute, but the only question on the facts which arises here is whether the evidence

showed that appellant Pauline Schnell aided or abetted in the outrage perpetrated by her son and his two assistants. That she did so is denied by her and her son and her guilt if such there was, could only be determined from the following circumstances:

After the assault was agreed upon by the three men, Schnell told the other two he wanted to go and see his sister and he then went to the hotel and returned to them in ten or fifteen minutes. It is admitted by both the mother and son that he did go to her at that time and request her to go up towards the house that evening, but both state he did not tell her of the offense contemplated. He testified that he expected to see some trouble there and wanted her to go out there that she might help him if he was hurt, if he was wounded or anything of that kind. While she stated that he requested her to walk up to the house, but gave no information as to what he desired her to go there for. As to her movements thereafter, appellee introduced the following evidence.

Dr. Dieterich testified that he saw her that evening on the street at 10:15, that he had a talk with her, and she inquired if he had seen Carlyle her son; that she then went back to the Truesdail Hotel; that he saw her again that evening about half an hour later about the same place going south, about a distance and then west, that she was alone, and also saw her come back at about 11 o'clock and go to her hotel; that he was sitting in front of the hotel when she came back. The city marshall testified he saw her at the southwest corner of the court house square, going towards the Hahn residence at ten minutes of eleven o'clock; that he asked her if she was looking

showed that appellant Pauline Schnell aided or assisted in the outrage perpetrated by her son and his two companions. That she did so is denied by her and her son and her [illegible] if such there was, could only be determined from the [illegible] circumstances:

After the assault was agreed upon by the three [illegible] told the other two he wanted to go and see his [illegible] then went to the hotel and returned to them in [illegible] minutes. It is admitted by both the mother and son that he did go to her at that time and request her to go up towards the house that evening, but both state he did not tell her of the offense contemplated. He testified that he [illegible] to see some trouble there and wanted her to go out there that she might help him if he was hurt, if he was wounded or anything of that kind. While she stated that he requested her to wait up to the house, but gave no information as to what he desired her to go there for. As to her movements thereafter, appellee introduced the following evidence.

Dr. Dieterich testified that he saw her that evening on the street at 10:10, that he had a talk with her, and she inquired if he had seen Carlyle her son; that she then went back to the Tremedall Hotel; that he saw her again that evening about half an hour later about the same place going south, between distance and then went, that she was alone, and also saw her come back at about 11 o'clock and go to her hotel; that he saw sitting in front of the hotel when she came back. The city marshall testified he saw her at the southwest corner of the court house square, going towards the Mann residence at [illegible] minutes of eleven o'clock; that he asked her if she was looking

for her son Carlyle, and she said she was not. Mr. Wilcox testified he saw her in the same vicinity at about the same time and later saw her on the north side of the square going east towards the hotel about 12 o'clock. Otto Mink testified to seeing her while she was talking to Dr. Wilcox but did not know what time it was. H. M.Shoupe stated he saw her coming from the direction of the Hahn residence towards the hotel at 11:30 o'clock, Josephine Ruf,who lived southeast of the Hahn residence just across the street, testified that on the evening in question,about 9:30 she saw a woman going across the street in a north westerly direction towards the Hahn residence and that about an hour later she saw her doing about the same thing; that when she saw her she was a few feet from the water plug; that about half an hour after she saw her the second time she heard some one dragging something along the west side of the house and got up and looking out of the window saw three men attaching a hose to the water plug; that the two of them then carried the hose across the street and one stayed at theplug that the lady she saw the first and second time appeared to be the same person; that she was acquainted with Mrs. Mchnell and "this lady was built about like Mrs.Mchnell". Appellant testified in her own behalf that she left the hotel about 10:30 p.m. and walked to the water plug in question, and about fifty feet beyond; that she then turned and came back to the hotel; that immediately thereafter she met the marshall and when going back to the hotel saw Mr. Mink and Dr. Wilcox; that at that time she also saw Dr. Dieterich and two other men and asked them if they had seen her boy;that when she reached the hotel from her trip, it could not have been more than a few minutes

for her son Carlyle, and she said she was not. Mr. Hilcox testified he saw her in the same vicinity at about the same time and later saw her on the north side of the square going east towards the hotel about 12 o'clock. Otto Kunk testified to seeing her while she was talking to Dr. Hilcox but did not know what time it was. H. M. Shoupe stated he saw her coming from the direction of the Hahn residence towards the hotel at 11:30 o'clock, Josephine Hut, who lived southeast of the Hahn residence just across the street, testified that on the morning in question, about 9:30 she saw a woman going across the street in a north westerly direction towards the Hahn residence and that about an hour later she saw her doing about the same thing; that when she saw her she was a few feet from the water plug; that about half an hour after she saw her the second time she heard some one dragging something along the west side of her house and got up and looking out of the window saw three men attaching a hose to the water plug; that the two of them then carried the hose across the street and one judged at trying that the lady she saw the first and second time appeared to be the same person; that she was acquainted with Mrs. Kennedy and "this lady was built about like Mrs. Kennedy". Appellant testified in her own behalf that she left the hotel about 10:30 p.m. and walked to the water plug in question, and went forty feet beyond; that she then turned and came back to the hotel; that immediately thereafter she met the marshall and when going back to the hotel saw Dr. Hink and Dr. Hilcox; that at that time she also saw Dr. Hoterkin and the other men she named then if they had seen her boy; that when she reached the hotel from her trip, it could not have been more than a few minutes

past 11 o'clock and that she was not "up there" at any other time that night.

While the proof does not positively show that appellant was present at the time the outrage was actually committed, yet it tends to show she was there at the place where it was committed on two occasions during the evening, one of which was at least very near to the time the offense was committed and the evidence as a whole shows facts from which a very natural inference arises that she knew the offense was contemplated by her son. Under these circumstances it was for the jury to say whether she was present aiding and abetting her son in the commission of the offense or if not present, that she had knowledge that the offense was about to be committed and advised and encouraged or abetted him in the commission of the same, in either of which cases she as well as her son would be liable to appellee for the damages incurred by him.

Appellant lays stress upon errors alleged to have been contained in the third instruction given for appellee. That instruction is as follows: "The court further instructs that if you believe from a preponderence of the evidence in this case that David Shade and Thomas Thalls willfull, and maliciously entered the premises occupied by the plaintiff in the night time, and turned a stream of water from a hose, connected with the city hydrant, upon the dwelling house occupied by the plaintiff and through the open window of said house upon the person of the plaintiff, as charged in the declaration, and if you further believe, from the evidence, that said David Shade and Thomas Thalls were procured or employed to do said unlawful act by the defendant Carlyle Schnell, and that he stood by and aided and abetted them in the perpetration of the same, and if you believe

past 11 o'clock and that she was not [illegible] at [illegible] time that night.

While the proof does not positively show that [illegible] was present at the time the entrance was actually [illegible], it tends to show she was there at the place where it was [illegible]ed on two occasions during the evening, one of which was at least very near to the time the offense was committed, and the evidence as a whole shows facts from which a very [illegible] inference arises that she knew the offense was contemplated by her son. Under these circumstances it was for the jury to say whether she was present aiding and abetting her son in the commission of the offense or if not present, that she had knowledge that the offense was about to be committed and advised and encouraged or abetted him in the commission of the same, in either of which cases she as well as her son would be liable to appellee for the damages incurred by him.

Appellant lays stress upon errors alleged to have been contained in the third instruction given for appellee. That instruction is as follows: "The court further instructs the jury believe from a preponderance of the evidence in this case that David Slade and Thomas Thalls willfully and wrongfully entered the premises occupied by the plaintiff in the night time, and turned a stream of water from a hose, connected with the city hydrant, upon the dwelling house occupied by the plaintiff and through the open window of said house upon the person of the plaintiff, as charged in the declaration, and if you further believe, from the evidence, that said David Slade and Thomas Thalls were procured or employed to do said wrongful act by the defendant Carlyle Connell, and that in attempting to do so they abetted them in the perpetration of the same, and if you further

believe from the evidence that the defendant, Pauline Schnell, was the owner of the dwelling house in question, and that with view of procuring possession of the same or forcing the plaintiff and his family to vacate the dwelling house, she was present or stood by and aided, abetted, or encouraged the said Carlyle Schnell in the commission of said unlawful acts, or if you believe from the evidence that the said Pauline Schnell not being present had knowledge of what was about to be done, and had advised, encouraged, aided or abetted the said Carlyle Schnell to attempt to dispossess the plaintiff and secure possession of said dwelling house by the commission of the act done, then both the defendants, Carlyle Schnell and Pauline Schnell, are liable for the unlawful acts of the said David Shade and Thomas Thalls."

The particular objection made by appellant to this instruction is that it appears to lay stress on the supposed desire on the part of appellant to procure possession of the premises in question by forcing appellee and his family to vacate the same. While there had been trouble between the parties to the leasing prior to this time, there was no positive proof that appellant desired to obtain possession of hersaid premises from appellee and the portion of the instruction referring thereto, is somewhat in the nature of an argument setting forth a reason why appellant might have desired or been led to assist or encourage her son in his unlawful assault upon appellee and his family and on that account the instruction might have been refused or modified by the court. But regardless of any reason which may or may not have actuated appellant to have assisted or encouraged said offense, the instruction correctly sets forth

believe from the evidence that the defendant, [illegible] was the owner of the dwelling house in question, and that [illegible] view of procuring possession of the same or forcing the plaintiff and his family to vacate the dwelling house, did [illegible] present or aid by and aided, abetted, or encouraged the [illegible] Carlyle Sohnell in the commission of said unlawful acts, [illegible] you believe from the evidence that the said [illegible] not being present had knowledge of what was about to be done, and had advised, encouraged, aided or abetted the said Carlyle Sohnell to attempt to dispossess the plaintiff and secure possession of said dwelling house by the commission of the act done, then both the defendants, Carlyle Sohnell and [illegible] Sohnell, are liable for the unlawful acts of the said David Shade and Thomas Shade."

The particular objection made by appellant to the instruction is that it appears to lay stress on the supposed desire on the part of appellant to procure possession of the premises in question by forcing appellee and his family to vacate the same. While there had been trouble between the parties relating prior to this time, there was no positive proof that appellant desired to obtain possession of premises [illegible] from appellee and the portion of the instruction referring thereto, is somewhat in the nature of an argument setting forth a reason why appellant might have desired or been led to [illegible] or encourage her son in the unlawful assault upon appellee and his family and on that account the instruction will not be [illegible] refused or modified by the court. But regardless of any [illegible] which may or may not have actuated appellant to have assisted or encouraged said offense, the instruction correctly [illegible]

a rule of law applicable to the case and the argumentative part of it does not appear to us to be sufficiently material to warrant a reversal of the case on that account.

Appellant also insists that the court erred in refusing to permit Carlyle Schnell, one of the defendants sued, to show that he had paid out large sums for fine and costs for the same act and that Mrs. Hahn had recovered a judgment against him for $500.00 This evidence appears to us to have been properly excluded, as it could not affect the right of this appellee to recover against Carlyle Schnell nor the amount of that recovery. But even if that were not the case, it could not be taken advantage of here as it did not in any manner concern appellee's right of action against Mrs. Schnell, who is the only appellant. Appellant also complains that the court erred in refusing certain of her instructions in regard to exemplary or punitive damages, but we find from an examination of them that they were fully covered so far as proper, by an instruction given the court on behalf of appellant upon the same subject.

The judgment of the court below will be affirmed.

Affirmed.

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(Not to be reported in full)

a rule of law applicable to the case and the [illegible]
part of it does not appear to us to be sufficiently [illegible]
to warrant a reversal of the case on that account.

Appellant also insists that the court erred in [illegible]
to permit Carlyle Schnell, one of the defendants named in
show that he had paid out large sums for the [illegible]
same act and that Mrs. Hahn had recovered a judgment against
him for $800.00. This evidence appears to us to have been [illegible]
excluded, as it could not affect the right of this appellee to
recover against Carlyle Schnell nor the amount of that recovery.
But even if that were not the case, it could not be taken
advantage of here as it did not in any manner concern appellant's
right of action against Mrs. Schnell, who is the only appellee.

Appellant also complains that the court erred in refusing
certain of her instructions in regard to exemplary or punitive
damages. But we find from an examination of them that they were
fully covered so far as proper, by an instruction given the
court on behalf of appellant upon the same subject.

The judgment of the court below will be affirmed.

AFFIRMED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

1294

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Ballance

vs.

No. 14

October Term, 1913.

City of Granite City

ERROR TO
~~APPEAL FROM~~

188 I.A. 315

Circuit COURT

Madison COUNTY

TRIAL JUDGE

Hon. W. E. Hadley

Term No. 14. Agenda No. 49.

October Term, A. D. 1913.

Thomas M. Ballance, Defendant In Error, vs. City of Granite City, Plaintiff in Error.	Error to Circuit Court of Madison County.

188 I.A. 315

Opinion by Harris, J.

The declaration of one count alleged that on the 7th day of November, 1909, plaintiff in error wrongfully permitted the sidewalk on the east side of A Street to be and remain in an unsafe condition for travel; that it permitted the boards, planks, stringers and timbers of said sidewalk to be and remain in a rotten, loose and defective condition; alleged notice to the City; that defendant in error, on the evening of the 7th day of November, 1909, was walking along and over said sidewalk in the exercise of due care and caution, and tripped and fell by reason of the defective condition of the sidewalk. Avers expenditure of $200.00 in trying to be cured of his injuries, and alleges damages in sum of Ten thousand Dollars. To this declaration plaintiff in error files plea of not guilty. The jury returned a verdict against plaintiff in error for sum of $2,091.00. Judgment entered on the verdict and this appeal prosecuted.

The error argued for a reversal of this case is that the verdict of the jury is manifestly against the weight of the evidence. The defendant in error assumed the burden of proving by a preponderance of the evidence:

That the sidewalk in question was out of repair at the time

Term No. 14. Gen'l No. 45.

October Term, A. D. 1913.

Thomas M. Ballance, Defendant in Error,	
vs.	Error to Circuit Court of Madison County.
City of Granite City, Plaintiff in Error.	

Opinion by Harris, J.

The declaration of one count alleged that on the 7th day of November, 1909, plaintiff in error wrongfully permitted the sidewalk on the east side of A Street to be and remain in an unsafe condition for travel; that it permitted the boards, planks, stringers and timbers of said sidewalk to be and remain in a rotten, loose and defective condition; alleged notice to the City; that defendant in error, on the evening of the 7th day of November, 1909, was walking along and over said sidewalk in the exercise of due care and caution, and tripped and fell by reason of the defective condition of the sidewalk. Avers expenditure of $200.00 in trying to be cured of his injuries, and alleges damages in sum of Ten thousand Dollars. To this declaration plaintiff in error filed plea of not guilty. The jury returned a verdict against plaintiff in error for sum of $2,091.00. Judgment entered on the verdict and this appeal prosecuted.

The error argued for a reversal of this case is the verdict of the jury is manifestly against the weight of the evidence. The defendant in error assumed the burden of proving by a preponderance of the evidence:

That the sidewalk in question was out of repair at the time

of the accident and for a sufficient length of time prior thereto that the city had notice thereof, actual or constructive. That the City had notice of the accident as provided by statute. That defendant in error was at the time of the accident in the exercise of due care. That he was injured and the extent thereof.

The argument of plaintiff in error is confined to the injury and that the evidence does not show walk out of repair. That the defendant in error was lying on or near the walk in question calling for help is not disputed. That one of the boards of the walk wasout of place at the time is not disputed. He describes how the accident occurred and this is disputed only by argument and what plaintiff in error calls physical facts. The extent of the injury to defendant in error is testified to by himself and Dr. Irwin, the attending physician, and this is disputed by argument and inference drawn by plaintiff in error from the evidence.

That the city was given the statutory notice of the injury in time to make an investigation is not disputed. That the sidewalk was at the time out of repair and had been for some months prior thereto is testified to by Jacob Scherer, W. E. Hancock, Mary Hogan, Ellen Christy, Ed Voorhees, Mylo Batchell, Charles Bezona, William Shutto, Mrs. John Green, W. E. Howell, Charles Hogan, Jerry Watson, John Dial, John Atchison, Clay Holmes and Defendant in error. Upon this question plaintiff in error offered the evidence of J. C. Schoene, R. D. Schmidt, G. W. Sink, Grover Shotwell, J. H. Brown, George Furnish, Ben Angelo, John Maserang, as witnesses showing the sidewalk at this place was not out of repair. The credibility of a number of these witnesses was called in question by plaintiff in error and is now argued.

of the accident and for a sufficient length of time prior thereto that the city had notice thereof, actual or constructive. That the City had notice of the accident as provided by statute. That defendant in error was at the time of the accident in the exercise of due care. That he was injured and the extent thereof.

The argument of plaintiff in error is confined to the injury and that the evidence does not show walk out of repair. That the defendant in error was lying on or near the walk in question calling for help is not disputed. That one of the boards of the walk became out of place at the time is not disputed. He describes how the accident occurred and this is disputed only by argument and what plaintiff in error calls physical facts. The nature of the injury to defendant in error is testified to by himself and Dr. Irwin, the attending physician, and this is disputed by argument and inference drawn by plaintiff in error from the evidence.

That the city was given the statutory notice of the injury in time to make an investigation is not disputed. That the sidewalk was at the time out of repair and had been for some months prior thereto is testified to by Jacob Weaver, S. S. Hancock, Mary Hogan, Ellen Christy, Ed Voorhees, Wylo Hatchell, Charles Beason, William Shutte, Mrs. John Green, S. E. Howell, Charles Hogan, Jerry Watson, John Dial, John Atchison, Clay Holmes and defendant in error. Upon this question plaintiff in error offered the evidence of J. C. Bohanon, R. D. Schmidt, C. W. Sink, Grover Shotwell, J. H. Brown, George Hartsen, Ben Angelo, John Masterson, as witnesses showing the sidewalk at this place was not out of repair. The credibility of a number of these witnesses was called in question by plaintiff in error and is now argued.

The Court and the jury trying the case have a duty to perform and with that duty assume responsibility and their finding on questions of fact is entitled to more than formal consideration. The trial court, as well as the jury, see the witnesses, listen to their evidence, and finally upon a motion for new trial the court assumes the responsibility of putting upon that verdict its approval. From that time forward the plaintiff in error assumes the burden of showing on appeal, not only that there has been a mistake in determining where the weight of the evidence lies but that the verdict, if permitted to stand, is contrary to the evidence or that there is no evidence at all to support it. "And where there is a contrariety of evidence on both sides, and the facts and circumstances, by a fair and reasonable intendment, will warrant the inferences of the jury, courts will reluctantly, if ever, disturb their verdict, notwithstanding it may appear to be against the strength and weight of the testimony. So, where the verdict depends upon the credibility if the witnesses, it is the peculiar province of the jury to judge of that credibility, to attach weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances, arising in the particular case; such as the relationship of the witness to one or both of the parties in controversy, his supposed interest in the event of the suit, his means of knowledge in respect to the matters in dispute, his appearance upon the stand, his manner of testifying, his general character for veracity, and the like, and to find their verdict accordingly." (Lowry v. Orr et al., 1 Gilman 70, (page 83.)

This case upon the facts is not such a case as would justify this court in setting this verdict aside upon the ground that it is against the manifest weight of the evidence, the judgment will therefore be affirmed.

Affirmed.

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(Not to be reported in full.)

The court and the jury trying the case have a duty to perform and with that duty assume responsibility and their finding on questions of fact is entitled to more than formal consideration. The trial court, as well as the jury, see the witnesses, listen to their evidence, and finally upon a motion for new trial the court assumes the responsibility of putting upon that verdict its approval. From that time forward the plaintiff in error assumes the burden of showing on appeal, not only that there has been a mistake in determining where the weight of the evidence lies but that the verdict, if permitted to stand, is contrary to the evidence or that there is no evidence at all to support it. "And where there is a contrariety of evidence on both sides, and the facts and circumstances, by a fair and reasonable intendment, will warrant the inference of the jury, courts will reluctantly, if ever, disturb their verdict, notwithstanding it may appear to be against the strength and weight of the testimony. So, where the verdict depends upon the credibility if the witnesses, it is the peculiar province of the jury to judge of that credibility, to attach weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances, arising in the particular case; such as the relationship of the witness to one or both of the parties in controversy, his supposed interest in the event of the suit, his means of knowledge in respect to the matters in dispute, his appearance upon the stand, his manner of testifying, his general character for veracity, and the like, and to find their verdict accordingly." (Howry v.Orr et al.,1 Gilmen 70,(page 85.)

This case upon the facts is not such a case as would justify this court in setting this verdict aside upon the ground that it is against the manifest weight of the evidence, the judgment will therefore be affirmed.

Affirmed.

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(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh.

Clerk of the Appellate Court.

OPINION

Fee $ ....

1216 ~~1247~~

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

168 I.A. 321

Huchett Admx

vs.

No. 25

October Term, 1913.

Williamson Co. Coal Co.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

Hon. Richard S. Farmer

Term No. 35. Agenda No. [illegible].

October Term, A. D. 1913.

Angelique Huchette, Administratrix of the Estate of J. B. Hutchette, deceased, Appellee, vs. Williamson County Coal Company, Appellant.	188 I A, 321 Appeal from Circuit Court of Williamson County.

Opinion by Harris, J.

The appellee in December 1911 filed in this case a declaration consisting of four counts in the circuit court, all of which charged common law negligence in the usual form and language. The first count that the appellant carelessly and negligently failed to prop its roof. That appellant knew of its dangerous condition or could have known of it. That appellee's deceased did not know of such dangerous condition, and did not know of the dangers consequent to improperly propping roof and did not have equal means of knowing with appellant. The second count that said roof was insufficiently propped and same as first count. The third count that the roof was insufficiently propped and that deceased was carelessly and negligently sent into cross cut to assist in extinguishing fire, the escape of steam and loosening of rock, etc. The fourth count same as third, negligent order, unsafe place to work and, etc.

All of said counts charged that the deceased while

Term No. 25. Agenda No. 6.

October Term, A. D. 1913.

Angelique Hubbette, Administratrix of the Estate of J. B. Hubbette, deceased, Appellee,	Appeal from Circuit Court of Williamson County.
vs.	
Williamson County Coal Company, Appellant.	

Opinion by Harris, J.

The appellee in December 1911 filed in this case a declaration consisting of four counts in the circuit court, all of which charged common law negligence in the usual form and language. The first count that the appellant carelessly and negligently failed to prop its roof. That appellant knew of its dangerous condition or could have kn r of it. That appellee's deceased did not know of such dangerous condition, and did not know of the dangers consequent to improperly propping roof and did not have equal means of knowing with appellant. The second count that said roof was insufficiently propped and same as first count. The third count that the roof was insufficiently propped and that deceased (a careless and negligently sent into room out to assist in extinguishing fire, the escaping of stone [illegible] loosening of rock, etc. The fourth count [illegible] negligent order, unsafe place to work and, etc.

All of said counts charged that the deceased while

he was in the exercise of due care was killed by [illegible] the negligence of appellant to the damage of the plaintiff in the sum of Ten thousand Dollars.

The plea of not guilty filed by appellant [illegible] joined thereon. From the evidence it could appear that there was a trial in July 1912. The record discloses a trial had in April 1913. A disagreement of the jury. Another trial in May 1913, a verdict of the jury finding appellant guilty, appellee's damages fixed at $1400.00. Judgment thereon and this appeal. The facts in this case, only a few of which are in dispute, appear as follows:

The appellant was on the 30th day of January, 1911, and for some time prior thereto operating a coal mine near Johnston City in said county, employing a number of men among whom was appellee's deceased husband J. B. Huchette. That some two or three days prior to the 20th day of January, 1911, the day of the accident, a fire broke out in the mine and mining operations were suspended and the miners came out of the mine. Men were employed to go into the mine to fight and extinguish the fire. Among those employed was appellee's deceased, a man 30 years old, who had been employed in coal mines in France and this country from boyhood.

In fighting the fire the company employed two shifts of men, the day shift under John Barlow, Mine Manager left the mine on the day in question at 7 P. M. The night shift under George Foster, acting foreman entered the mine at the time the day shift left. Appellee's deceased, with Sam Yackus were sent to the 1st cross cut between the Fifth and Sixth south entries off of the east entry to use the hose

be due to the negligence of one [illegible] killed [illegible] the negligence of appellant to the damage of the plaintiff in the sum of Ten thousand Dollars.

The plea of not guilty filed by appellant [illegible] joined thereon. From the evidence it could appear [illegible] was a trial in July 1912. The record disclosed [illegible] had in April 1913. A disagreement of the jury. Another trial in May 1913, a verdict of the jury finding appellant guilty, appellee's damages fixed at $14000.00. Judgment thereon and this appeal. The facts in this case, only a few of which are in dispute, appear as follows:

The appellant was on the 30th day of January, 1911, and for some time prior thereto operating a coal mine near Johnston City in said county, employing a number of men among whom was appellee's deceased husband L. B. Hockette. That some two or three days prior to the 30th day of January, 1911, the day of the accident, a fire broke out in the [illegible] and mining operations were suspended and the miners [illegible] of the mine. Men were employed to go into the mine to fight and extinguish the fire. Among those employed was appellee's deceased, a man 30 years old, who had been employed in coal mines in France and this country from boyhood.

In fighting the fire the company employed two shifts of men, the day shift under John Barlow, Mine Manager left the mine on the day in question at 7 P. M. The night shift under George Foster, acting foreman entered the mine at the time the day shift left. Appellee's deceased, [illegible] Sam Yankus were sent to the last crosscut but one from the [illegible] and Sixth south entries off of the main entry to see if there

in extinguishing fire. This cross cut prior to the time of the breaking out of fire had been closed up, but to give them a better opportunity to get at the fire which was burning in the fifth entry , the gob and refuse in this cross cut was removed and prior to seven o'clock of the evening of the day in question under direction of mine manager the roof was propped. That the work was done in a proper manner is the testimony of witnesses called by appellee. That a short time before the accident according to the evidence of acting foreman George Foster and Charles Clark, Master Mechanic, walked up the sixth entry south to cross cut where Hutchette, Yackus, Sobleski were working. That after they sounded the roof they both expressed themselves in the presence of the deceased that the place was unsafe and that Foster ordered the deceased and Yackus to leave the place. That Foster took the hose from deceased and Yackus and laid it on the slate putting a stone upon it and that Foster and Clark led the deceased and Yackus out into the sixth entry in a place of safety, ordered them to sit down and wait for them to return. That after they left deceased said to Yackus, his buddy, he was going back to see how the hose was working; he went back and Yackus with him. The testimony of Foster and Clark is corroborated by the evidence of Yackus as to what occurred while they were together and Yackus further says when they returned deceased began to pick the roof with his hand and caused it to crumble and fall in a few minutes, the stone weighing from five to eight tons fell upon and killed appellee's deceased.

in extinguishing fire. This cross cut prior to the time of the breaking out of fire had been closed up, but in view thus a better opportunity to get at the fire which was burning in the fifth entry, the log and refuse in this cross cut was removed and prior to seven o'clock of the morning of the day in question under direction of mine manager the roof was propped. That the work was done in a proper manner is the testimony of witnesses called by appellee. That a short time before the accident according to the evidence of acting foreman George Foster and Charles Clark, Master Mechanic, walked up the sixth entry south to cross cut where Hutchette, Yackus, Sobleski were working. That after they sounded the roof they both expressed themselves in the presence of the deceased that the place was unsafe and that Foster ordered the deceased and Yackus to leave the place. That Foster took the hose from deceased and Yackus and laid it on the slate putting a stone upon it and that Foster and Clark led the deceased and Yackus out into the sixth entry in a place of safety, ordered them to sit down and wait for them to return. That after they left deceased said to Yackus, his buddy, he was going back to see how the boys were working; he went back and Yackus with him. The testimony of Foster and Clark is corroborated by the evidence of Yackus as to what occurred while they were together and Yackus further says when they returned deceased began to pick the roof with his hand and caused it to crumble and fall in a few minutes, the stone weighing from five to eight tons fell upon and killed appellee's deceased.

Foster, Clark and Yackus were old and experienced miners and understanding the English language. Foster at time of trial was not employed by appellant. Stanley Sobleski who was present at time of accident shortly thereafter left the state and did not testify. That Sobleski was working at the brackets, not with deceased and Yackus, but fifteen or twenty feet away.

The evidence of an Italian Mike Monari as to the presence of Foster and Clark where deceased and Yackus were working and as to what was done or said is the only evidence in the record upon which appellee base their right to recover. This Witness Monari, who testifies through an interpreter and says his knowledge of the English language was confined to mine talk. That at the time of the accident he had been in America about eighteen months, working at this mine fifteen months; says he was at the place where the accident happened at the time, saw Foster and Clark there, that they left without making any examination of the roof or saying anything to deceased or Yackus. That Foster and Clark did not take deceased and Yackus out of cross cut, although he Monari says that he was away from this place about 30 minutes, putting up a canvasx in second cross cut, a canvas that other witnesses say was not there. That he, Monari, drew no pay for this night in question and from his evidence, except as to putting up canvas was without employment.

The burden is upon the plaintiff under this declaration to prove by a preponderance of the evidence:

That the deceased while in the exercise of due care and caution was injured by the appellant failing to use reasonable care to furnish deceased with a reasonably safe place

Foster, Clark and Yuckus were old and experienced miners and understanding the English language. Foster at time of trial was not employed by appellant. Stanley Sobiski who was present at time of accident shortly thereafter left the State and did not testify. That Sobiski was working at the premises, not with deceased and Yuckus, but fifteen or twenty feet away.

The evidence of an Italian Mike Monari as to the presence of Foster and Clark where deceased and Yuckus were working and as to what was done or said is the only evidence in the record upon which appellee base their right to recover. This Witness Monari, who testifies through an interpreter and says his knowledge of the English language was confined to nine talk. That at the time of the accident he had been in America about eighteen months, working at this mine fifteen months; says he was at the place where the accident happened at the time, saw Foster and Clark there, that they left without making any examination of the roof or saying anything to deceased or Yuckus. That Foster and Clark did not take deceased and Yuckus out of cross cut, although he Monari says that he was away from this place about 30 minutes, visiting a cavvass in second cross cut, a cavvass that other witnesses say was not there. That he, Monari, drew no pay for that night in question and from his evidence, except as to getting up cavvas was without employment.

The burden is upon the plaintiff under this declaration to prove by a preponderance of the evidence:

That the deceased while in the exercise of due care and caution was injured by the appellant failing to use reasonable care to furnish deceased with a reasonably safe place

to work. That at time of accident deceased was acting under and in obedience to a special order. That the danger was known to appellant or could have been known by exercise of reasonable care. That deceased did not know of the extra danger. That deceased was free from negligence which contributed to the injury. The contention of appellee is that because the case has been submitted to the jury and the jury have answered the special interrogatories submitted and by general verdict found for appellee that it puts this case in that category where the Court have said: "When there is a contrariety of evidence and the facts and circumstances by fair and reasonable intendment will authorize a verdict notwithstanding it may appear to be against the strength and weight of the testimony the verdict will not be set aside. The examination of the record in this case with the facts upon which those decisions are based calls for the application of an entirely different rule.

That deceased was working under a general and not special order and that the danger was pointed out to deceased and Yackus and they taken to a place of safety is the evidence of Foster, Clark and Yackus, denied only by the Italian who was known as Mike Monari, with all the circumstances and inferences to be drawn from the evidence corroborating the three witnesses and not the one witness. When these are the facts and the condition of this record the duty of this Court as was said in the case of Illinois Steel Co. vs Kennali, 83 App., 83, "If the finding of the jury be without any support whatever, or if it be contrary to the manifest weight of the evidence, in either case the duty of this Court is to so

to work. That at time of accident deceased was acting under and in obedience to a special order. That the danger was known to appellant or could have been known by exercise of reasonable care. That deceased did not know of the alleged danger. That deceased was free from negligence which contributed to the injury. The contention of appellee is that because the case has been submitted to the jury and the jury have answered the special interrogatories submitted and by general verdict found for appellee that it rule this case in that category here the Court have said: "When there is a contrariety of evidence and the facts and circumstances of fair and reasonable intendment will authorize a verdict notwithstanding it may appear to be against the strength and weight of the testimony the verdict will not be set aside. The examination of the record in this case with the facts upon which those decisions are based calls for the application of an entirely different rule.

That deceased was working under a general and not special order and that the danger was pointed out to Jackson and Yackus and they taken to a place of safety is the evidence of Foster, Clark and Yackus, denied only by the Italian who was known as Mike Monari, with all the circumstances and inferences to be drawn from the evidence corroborating the other witnesses and not the one witness. When these are the facts and the condition of this record the duty of this Court as was said in the case of Illinois Steel Co. vs Kennell, 92 App., 83, "If the finding of the jury be without the support whatever, or if it be contrary to the manifest weight of the evidence, in either case the duty of this Court is to set

declare and to set aside a judgment based upon such a finding. Citing many cases where the Supreme Court so held when it reviewed questions of fact."

A second verdict based upon substantially the same evidence will be set aside as against the evidence and a final judgment rendered in favor of adverse party where the evidence does not support the judgment in the lower court. (Harvey vs McGuirk 168 App., 390).

The mere fact that a jury have passed upon questions of fact cannot absolve this court from determining whether or not the verdict is justified by the evidence. (I. C. R. R. vs Cunningham, 103 App., 206).

The verdict and judgment in this case being without sufficient evidence to support it and the case having been tried at least twice in the lower court and from the record it appears all of the facts have been brought forward by both parties material to the issues a new trial would serve no good purpose and the case will be reversed with a finding of fact as it would not be of any advantage to either of the parties to discuss other errors assigned.

We are of the opinion that justice and the best interest of the parties require an end to be put to this unfortunate and expensive litigation and the judgment of the circuit court is therefore reversed.

Reversed with finding of fact.

Finding of fact to be incorporated in judgment of Court:

That the deceased J. B. Hutchette at the time of the accident was not exercising due care for his own safety. That he had been taken from the place where he was injured

declare and to set aside a judgment based upon such a finding. Citing many cases where the Supreme Court so held when it reviewed questions of fact."

A second verdict based upon substantially the same evidence will be set aside as against the evidence and a final judgment rendered in favor of defendants notwithstanding the evidence does not support the judgment in the lower court. (Harvey vs McGuirk 163 App., 320).

The mere fact that a jury have passed upon questions of fact cannot absolve this court from determining whether or not the verdict is justified by the evidence. (I. C. R. R. vs Cunningham, 108 App., 208).

The verdict and judgment in this case being without sufficient evidence to support it and the case having been tried at least twice in the lower court and from the record it appears all of the facts have been brought forward by both parties material to the issues a new trial would serve no good purpose and the case will be reversed with a finding of fact as it would not be of any advantage to either of the parties to discuss other errors assigned.

We are of the opinion that justice and for the interest of the parties require an end to be put to this unfortunate and expensive litigation and the judgment of the circuit court is therefore reversed.

Reversed with finding of fact.

Finding of fact to be later entered in judgment of Court:

That the deceased J. B. Hutchinson at the time of the accident was not exercising due care for his own safety. That he had been taken from the plow where he was injured

by appellant to a place of safety and directed to keep out of the place where he was hurt. His return to the place of injury was in violation of these directions.

(Not to be reported in full.)

by appellant to a place of safety and directed to take him
of the place where he was hurt. His return to the place of
injury was in violation of these directions.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

1218 ~~1244~~

A. 328

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Russell

vs.

No. 49

October Term, 1913.

O'Gara Coal Co

~~ERROR TO~~
APPEAL FROM

188 I.A. 328

Circuit COURT

Saline COUNTY

TRIAL JUDGE

Hon. A. W. Lewis

Term No. 49. Agenda No. 21.

October Term, A.D.1913.

Essa Russell, Appellee,	)	
vs.	)	Appeal from Circuit Court of Saline County.
O'Gara Coal Company, Appellant.	)	

188 I A. 328

Opinion by Harris, J.

The declaration in this case consists of three statutory counts, the first charging a demand for props from mine manager and a failure to furnish suitable props. The second count charges a custom and practice adopted in mines and known and recognized by appellant, whereby the diggers would order props, caps and timbers from the timber-man and that appellee's deceased so ordered but that appellant wilfully failed to provide them. The third count charges a dangerous condition in room where appellee's deceased was required in the exercise of his duties to be, consisting of loose slate, rock and other substance forming a part of the roof of said room, and that appellant knew of this dangerous condition or could have known thereof. That appellant allowed Thomas Russell to enter said room and to work therein without the direction of the mine manager before the said dangerous condition had been made safe. That in each of said counts it is alleged by reason thereof Thomas Russell was injured from which injuries he died and that appellee as his surviving widow has been damaged, etc. To each of the counts the general issue was filed, upon which a trial followed, verdict of jury finding appellant guilty on

Term No. 49. Docket No. 21.

October Term, A.D.1916.

Essa Russell, Appellee, vs. O'Gara Coal Company, Appellant.	Appeal from Circuit Court of Saline County.

Opinion by Harris, J.

1981.A.328

The declaration in this case consists of three statutory counts, the first charging a demand for proofs from mine manager and a failure to furnish suitable proofs. The second count charges a custom and practice adopted in mines and known and recognized by appellant, whereby the diggers would order proofs, caps and timbers from the timber-man and that appellee's decedent so ordered but that appellant wilfully failed to provide them. The third count charges a dangerous condition in room where appellee's deceased was required in the exercise of his duties to be, consisting of loose slate, rock and other substance forming a part of the roof of said room, and that appellant knew of this dangerous condition or could have known thereof. That appellant allowed Thomas Russell to enter said room and to work therein without the direction of the mine manager before the said dangerous condition had been made safe. That in each of said counts it is alleged by reason thereof Thomas Russell was injured from which injuries he died and that appellee as his surviving widow has been damaged, etc. To each of the counts the general issue was filed, upon which a trial followed, verdict of jury finding appellant guilty and

assessing appellee's damages at $2000.00; judgment thereon from which judgment this appeal is prosecuted.

The facts as they appear from the record are that on the 2nd day of March, 1911, Thomas Russell was employed by appellant as a loader of coal and was working in room 20 off of the 6th South off of the main east entry with his buddy Raymond Cross with whom he had worked for three months. The room was thirty feet wide and one hundred seventy feet in depth with a roof of what was called draw slate, and a floor of slate or hard substance. That the heighth of the room varied, depending upon amount of hanging slate. The vein of coal was from six feet two inches to six feet four inches. That for three months or more it had been the custom to order prop caps, and timbers of the timber-man and he with the driver would deliver them, measure and saw them to fit. That a few days before the accident Cross says Hughes, the timber-man, was in this room and asked Cross and Russell if they wanted any props, to which Cross says he said yes and Hughes says he said No, but props were delivered, although the timberman did not return to saw and fit them. They were not of suitable length to be used. There was an attempt by deceased to find a suitable prop on morning of accident and in the attempt he went into the entry and brought back a split prop and set it, which with the fall that followed broke. The treachery of this draw slate from the evidence was understood by deceased and by the timberman and the mine manager from the custom that existed in sounding the roof and the timberman's inquiries. That there were props in the room at the time of the accident, but were not suitable props under the custom that existed and was recognized by the company in that they had not been measured and sawed in suitable lengths. That the proper wayy of setting

assessing appellee's damages at $3000.00; judgment [illegible]
from which judgment this appeal is prosecuted.

The facts as they appear from the record are that on
the 2nd day of March, 1921, Thomas Russell was employed by
appellant as a loader of coal and was working in room 24 near
of the 6th South off of the main east entry with his brother
Raymond Cross with whom he had worked for three months. The
room was thirty feet wide and one hundred seventy feet in
depth with a roof of what was called draw slate, and a floor
of slate or hard substance. That the height of the room
varied, depending upon amount of hanging slate. The vein of
coal was from six feet two inches to six feet four inches. That
for three months or more it had been the custom to order prop
caps, and timbers of the timber-man and he with the driver
would deliver them, measure and saw them to fit. That a few
days before the accident Cross says Hughes, the timbermen,
was in this room and asked Cross and Russell if they needed
any props, to which Cross says he said yes and inches says he
said no, but props were delivered, although the timbermen did
not return to saw and fit them. They were not of suitable
length to be used. There was an attempt by deceased to find
a suitable prop on morning of accident and in the attempt he
went into the entry and brought back a split prop and left it,
which with the fall that followed broke. The testimony of
this draw slate from the evidence was understood by deceased
and by the timberman and the mine manager from the question
stated in sounding the roof and the timberman's inquiries.
That there were props in the room at the time of the accident,
but were not suitable props under the custom that existed and
was recognized by the company in that they had not been sawed
and sawed in suitable lengths. That the proper way of [illegible]

a prop was with a cap and an order for props was understood to include caps and timbers. That from a fall of this slate roof, on the day in question Thomas Russell was injured from which injuries he died.

The contention of appellant upon these facts is that at the time appellee's deceased ordered props, no props were needed and an order given in advance is not within the statute. From the evidence as to the condition of the roof in this mine such a rule if adhered to would either stop further work, after a dangerous condition was discovered until props were ordered and arrived or the digger would not live to see the props arrive. The statute is entitled to a more liberal construction and has been so construed in the case of Foreba v Ill. S. Coal Co., 156 App., 140.

It is further contended by appellant that the accident was not caused for want of peops because he had unused props. This is true as a bare statement still it must appear that he had props of suitable length, and in this case where the company has adopted and recognized a custom in regard to the manner of ordering props, caps and timbers and having the timberman measure and determine the lengths of suitable props, it is bound by such a custom , and the timberman under the facts becomes a vice-principal and his knowledge and neglect of duty is that of the company.

There is the same contention by appellant with reference to a dangerous condition and that deceased continued to work the two days after props were ordered. The timberman was in the room charged with knowledge of whatever dangerous condition existed and permitted the deceased to work without the direction of the mine manager. Appellant charged with notice that a dangerous condition existed. Contributory negligence or assumed risk constituted no defense.

a prop was with a cap and an order for props and timbers to include caps and timbers. That from a fall of this slate roof, on the day in question Thomas Russell was injured from which injuries he died.

The contention of appellant upon these facts is that at the time appellee's deceased ordered props, no props were needed and an order given in advance is not within the statute. From the evidence as to the condition of the roof in this mine such a rule if adhered to could either stop further work, after a dangerous condition was discovered until props were ordered and arrived or the digger would not live to see the props arrive. The statute is entitled to a more liberal construction and has been so construed in the case of Borche v Ill. S. Coal Co., 156 App., 140.

It is further contended by appellant that the accident was not caused for want of props because he had enough props. This is true as a bare statement still it must appear that he had props of suitable length, and in this case where the company has adopted and recognized a custom in regard to the manner of ordering props, caps and timbers and having the timbermen measure and determine the lengths of suitable props, it is bound by such a custom , and the timbermen under the facts become a vice-principal and his knowledge and neglect of duty is that of the company.

There is the same contention by appellant with reference to a dangerous condition and that deceased continued to work the two days after props were ordered. The timbermen was in the room charged with knowledge of whatever dangerous condition existed and permitted the deceased to work without the direction of the mine manager. Appellant charged with notice that a dangerous condition existed. Contributory negligence or assumed risk constituted no defense.

Appellant says the evidence in this case is close and therefore the rulings of the court in admitting evidence and instructing jury should be accurate. There are no errors as to the ruling of the court in admitting evidence or rejecting the same called to the attention of this court.

The complaint by appellant as to appellee's given instruction number one that it refers the jury to declaration refers to caps and timbers when the evidence was with reference to props. This instruction undertakes to set out what it is necessary for appellee to prove under first count of the declaration. And under the evidence in this case the undisputed evidence is that under the custom props, caps and timbers with miner and timberman were inseparable. Under the evidence it is not claimed that more than one order for props was given so the instructions as to time could not be misleading.

What has been said of appellee's first instruction applies to second and as to who was injured could not have misled the jury as no injury could result to appellee except by loss of her husband.

What has been said of instructions one and two applies to appellee's given instructions three and four. Especially is appellant's contention not good where appellant practically admits custom and recognition of it by offering no evidence to the contrary.

Appellee's given instructions numbered 6,8 and 9 are consistent and state substantially the law. The objection to the modification of appellant's sixteenth instruction is not well founded as the instruction modified was a correct statement of the law as applied to the facts. That appellee could not recover where deceased wilfully violated the mining statute and that

Appellant says the evidence in this case tended and therefore the rulings of the court in admitting evidence and instructing jury should be accurate. There are no errors to the ruling of the court in admitting evidence or rejecting the same called to the attention of this court.

The complaint by appellant is to appellee's given instruction number one that it refers to declaration refers to logs and timbers when the evidence was with reference to piers. This instruction undertakes to set out what it is necessary for appellee to prove under first count of the declaration. And under the evidence in this case the undisputed evidence is that under the custom piers, logs and timbers with minor and timbermen were inseparable. Under the evidence it is not claimed that more than one order for piers was given so the instruction as to time could not be misleading.

What has been said of appellee's first instruction applies to second and as to who was injured could not have misled the jury as no injury could result to appellee except by loss of her husband.

What has been said of instructions one and two applies to appellee's given instructions three and four. Practically appellant's contention not good where appellant practically admits custom and recognition of it by offering no evidence to the contrary.

Appellee's given instructions numbered 6,8 and 9 are consistent and state substantially the law. The objection to the modification of appellant's sixteenth instruction is not well founded as the instruction modified was a correct statement of the law as applied to the facts. That Appellee could not recover or where deceased wilfully violated the mining statute was not

involved under the facts in this case.

The modification of appellant's nineteenth instruction striking out the word "direct" and inserting the word "proximate" is not error but is approved in case of Chicago Terminal Co. v. Schmelling 197 Ill. 630.

Appellant contends there was error in the court making refused a number of its instructions but no special error is assigned that goes to the merits of the case. When these refused instructions are examined in connection with those given the jury, we find the jury were fully instructed upon the law and under the pleadings in this case.

We find no reversible error in this record and the judgment will therefore be affirmed.

Affirmed.

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(Not to be reported in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

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A 330

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Still, et al
Ex-

vs.

No. 61

October Term, 1913.

Still

~~ERROR TO~~
APPEAL FROM

188 I.A. 330

Circuit COURT

Madison COUNTY

TRIAL JUDGE

Hon. Louis Bernstein

Term No. 61. Agenda No. [illegible].

October Term A.D.1912.

Henry, James and Charles Still, Executors of Estate of Ann Still, deceased, Appellees,	
vs	Appeal from Circuit Court of Madison County.
Edward Still, Appellant.	

188 I.A. 330

Opinion by Harris, J.

This is a suit brought by appellees, in forcible detainer before a Justice of the Peace in Madison County appealed to Circuit Court and from Circuit Court this appeal.

The facts are that Thomas Still in his lifetime was the owner of the northeast quarter of the northeast quarter of section 34, township 6 range 10 west of 3rd p.m., in Madison County. That Thomas Still having the record title died in the year of 1909 leaving a last will and testament afterwards probated in and by which said will said tract of land was devised to his wife Ann Still. That at the time of the death of said Thomas Still and for some twenty-five years prior thereto said land was occupied by appellant Edward Still, not as owner but with some arrangement between them as to the occupancy the exact nature of which is neither definite nor material to the issues in this case. That after the death and probate of the will aforesaid appellant continued to occupy said land and in February, 1910, a forcible detainer suit was brought before a Justice of the Peace of said Madison County for the possession

Term No. 61. Agenda No. 74.

October Term A.D.1912.

Henry, Jesse and Charles Still, Executors of Estate of Ann Still, deceased, Appellees,	
vs	Appeal from Circuit Court of Madison County.
Edward Still, Appellant.	

Opinion by Harris, J.

This is a suit brought by appellees, in Jesse's chambers before a Justice of the Peace in Madison County appealed to Circuit Court and from Circuit Court into appeal.

The facts are that Thomas Still in his lifetime was the owner of the northeast quarter of the northeast quarter of section 24, township 6 range 10 west of 3rd P.M., in said Madison County. That Thomas Still having the record title died in the year of 1909 leaving a last will and testament afterwards probated in and by which said will said tract of land was devised to his wife Ann Still. That at the time of the death of said Thomas Still and for some twenty-five years prior thereto said land was occupied by appellant Edward Still, not as owner, but with some arrangement between them as to the consideration exact nature of which is neither definite nor material in the issues in this case. That after the death and probate of said will aforesaid appellant continued to occupy said land and in February, 1910, a forcible detainer suit was brought before a Justice of the Peace of said Madison County for the possession

of said land by Ann Still against Edward Still, a judgment entered in favor of Ann Still and against appellant for the rent due and unpaid and for the possession of the farm, a writ of restitution issued and executed.

That afterwards appellant desiring to keep the farm agreed upon a settlement of the judgment aforesaid with his mother Ann Still to lease said land for one more year for $100.00 and pay a portion of the back rent involved in the forcible detainer judgment. A written lease was prepared and signed by Ann Still and appellant on the 8th day of April, 1910 for one year. The terms of the lease and the description were written in said lease by Mr. McGinnis, Attorney for Ann Still in the presence of and with the consent of appellant. By mistake the word northeast was used in the description where the word northwest was intended.

That on September 10,1910, appellant paid to Ann Still upon the rent due under this lease the sum of $50.00 and at the expiration of the one year a demand in writing was made for possession, as complaint in writing properly describing the land and this suit brought.

That since the orders for appeal were taken in the circuit court appellee died: her last will and testament proven September 22,1913, a copy of the same being filed in this court, a suggestion on the record of death of appellee, and a substitution of Henry James and Charles Still, as Executors of Estate of Ann Still, deceased, as appellees.

Appellant urges three grounds for reversal of this case:

1st, That the procurement of the lease between Ann Still and appellant was procured by threats and intimidation.

2nd. Because the description in the lease does not describe the land occupied by appellant.

of said land by Ann Still against Edward Still, a judgment entered in favor of Ann Still and against appellant for the rent due and unpaid and for the possession of the farm, a writ of restitution issued and executed.

That afterwards appellant desiring to keep the farm entered upon a settlement of the judgment stipulated with the mother Ann Still to lease said land for one more year for $[illegible] and a portion of the back rent involved in the forcible detainer judgment. A written lease was prepared and signed by Ann Still and appellant on the 8th day of April, 1910 for one year. The terms of the lease and the description were written in said lease by Mr. McGinnis, Attorney for Ann Still in the presence of and with the consent of appellant. By mistake the north northwest was used in the description where the north northwest was intended.

That on September 10,1910, appellant paid to Ann Still upon the rent due under this lease the sum of $[illegible].00 and at the expiration of the one year a demand in writing was made for possession, as complaint in writing properly described, the land and this suit brought.

That since the orders for appeal were taken in the circuit court appellee died: her last will and testament probated September 22,1918, a copy of the same being filed in this court, a suggestion on the record of death of appellee, and a substitution of Henry James and Charles Still, as executors of Ann Still, deceased, as appellees.

Appellant urges three grounds for reversal of this case:

1st. That the procurement of the lease between Ann Still and appellant was procured by threats and intimidation.

2nd. Because the description in the lease does not describe the land occupied by appellant.

3rd. Because appellee never had the possession or the right of possession to the premises in controversy.

What is procured by threats or intimidation which would constitute duress and avoid what would otherwise be a binding obligation must be present and operative at the time of the signing of the instrument, such threat or intimidation as to destroy his free agency and make his act not his own but the act of another. This is not even claimed by appellant and this lease afterwards recognized by him and payment made thereon. It is not claimed he was even being urged to make payment.

The first proposition not being sustained, the appellant cannot have a binding lease with a mis-description recognized by both parties as a mistake because appellant says the premises he occupied were the same as involved in this suit and he was paying rent on the premises he occupied and no other. Therefore the mistake in description is properly explained, and the second proposition is without merit.

The third proposition and the authorities cited thereunder do not apply to this case because from a clear preponderance of the evidence one suit was brought by appellee for possession and rent compromised by appellant, a new lease made between the parties, payment of rent thereunder by appellant, a compromise of the tenancy thereunder to the bringing of this suit, and now appellant habing attorned to Ann Still as his landlord is estopped from either questioning her title or right to possession so long as he remains her tenant.

There is no error in this case and the judgment will be affirmed.

Affirmed.

****

(Not to be published in full).

3rd. because appellee never had the [illegible]

the right of possession to the premises in [illegible]

that is prompted by threats or intimidation [illegible]

constitute duress and avoid what would otherwise be [illegible]

obligationment be present and operative at the time [illegible]

ing of the instrument such threat or intimidation [illegible]

his free agency and make his act not his own but [illegible]

another. This is not even claimed by appellant [illegible]

afterwards recognized by him and payment made [illegible]

not claimed he was even being urged to make payment.

The first proposition not being sustained by the [illegible]

have a binding lease with a mis-description recognized by both

parties as a mistake because appellant says the premises [illegible]

occupied were the same as involved in this suit and he was [illegible]

ing rent on the premises he occupied and no other. [illegible]

the mistake in description is properly explained, and [illegible]

proposition is without merit.

The third proposition and the authorities after [illegible]

do not apply to this case because from a close [illegible]

the evidence one suit was brought by appellee for [illegible]

rent compromised by appellant, a new lease [illegible]

parties, payment of rent thereunder by appellant, [illegible]

of the tenancy thereunder to the bringing of this suit, [illegible]

appellant having attorned to him still as his landlord [illegible]

ed from either questioning her title or right to possession so

long as he remains her tenant.

There is no error in this case and the judgment will be

affirmed.

Affirmed.

(Not to be published in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th day of July, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

1302 1247

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Emery

vs.

No. 9

March Term, 1914.

Hasse

~~ERROR TO~~
APPEAL FROM

188 I.A. 342

Circuit COURT

Jasper COUNTY

TRIAL JUDGE

Hon. Thos. M. Jett

Term No. 9. Agenda No. 6.

March Term A.D. 1914.

George D. Emery, Appellant. vs. E. W. Hersh, Appellee.	Appeal from Circuit Court of [illegible] County.

188 I.A. 342

Opinion by Harris, J.

Appellant filed his declaration in assumpsit consisting of two counts, the first a special count averring that by reason of an oral contract appellee employed appellant as his attorney on the 27th day of July, 1910, in the City of Seattle State of Washington, to examine titles to certain lands in Jefferson County in said State, to advise regarding said titles and prepare forms for issue of bonds and represent appellee in the transaction then pending for the issue and sale of bonds, as his attorney, subject to an agreement between the owner of said lands and appellee. That appellee agreed to pay appellant for said services the sum of $500.00 and all necessary expenses. That appellant in all respects performed his said part of said agreement and necessarily expended the sum of $16.00. That by reason of a disagreement between appellee and the owner of the lands, said bond issue was abandoned September 1st, 1910, and appellee became liable to pay appellant the full amount of attorney fee and expenses.

The second count the common counts.

That the appellee filed the general issue a trial followed, verdict for appellant in sum of $256.25; upon motion [illegible] for new trial verdict was set aside, new trial [illegible]. [illegible] waived, a trial by court finding for appellee [illegible]

Term No. 9. Docket No. 7.

March Term A.D. 1914.

George D. Emery, Appellant.	Appeal from Grenvil County Court of Jasper County.
vs.	
F. W. Ferab, Appellee.	

Opinion by Harris, J.

Appellant filed his declaration in assumpsit containing of two counts, the first a special count averring that on reason of an oral contract appellee employed appellant as his attorney on the 27th day of July, 1910, in the City of Jasper state of Washington, to examine titles to certain lands in Grenvil County in said State, to advise regarding said titles and prepare forms for issue of bonds and represent appellee in the transaction then pending for the issue and sale of bonds, as his attorney, subject to an agreement between the owner of said lands and appellee. That appellee agreed to pay appellant for said services the sum of $500.00 and all necessary expenses. That appellant in all respects performed the said part of said agreement and necessarily expended the sum of $16.00. That by reason of a disagreement between appellee and the owner of the lands, said bond issue was abandoned. September 1st, 1910, and appellee became liable to pay appellant the full amount of attorney fee and expenses.

The second count the common counts.

That the appellee filed the general issue a trial [illegible] verdict for appellant in sum of $[illegible]; upon motion [illegible] for new trial verdict was set aside, new trial [illegible]. [illegible] waived, a trial by court thereon for appellee and [illegible]

The amount of appellant's fee and expenses are not in dispute, That appellant was employed by appellee as his attorney is not a matter of dispute. The errors assigned resolve themselves into two questions of fact:

First: Appelle claims that he employed appellant after the bonds were issued and everything completed to furnish a written opinion as to legality of the issue, such an opinion as appellee could furnish purchasers of the bonds.

Second: That appellant was to be paid out of a fund of $2500.00 allowed by the owners of the land to appellee and in no other way.

When these two questions of fact are disposed of all errors assigned and argued upon this appeal will be settled accordingly.

The first proposition as a question of fact calls for the judgment of the court as to whether appellant was employed as claimed by appellant or appellee. Appellant claims and in this is appported by Witness Rose that he was employed by appellee to investigate the title, prepare bonds, etc. The correspondence between appellant and appellee show that such service was being rendered from the 1st of August to the 1st of September, 1910, and that appellee upon this proposition is his denial withuut corroboration of either witness or correspondence. Indulging and giving to the trial court the benefit of that presumption that only competent evidence was considered we can not, when all the competent evidence is considered, justify the finding. Where the judgment is against the manifest weight of the evidence so that if permitted to stand the Court was satisfied there had been a miscarriage of justice it should be set aside.

The amount of appellant's fee and expenses are not in dispute, that appellant was employed by appellee as his attorney is not a matter of dispute. The errors assigned resolve themselves into two questions of fact:

First: Appelle claims that he employed appellant after the bonds were issued and everything completed to furnish a written opinion as to legality of the issue, such an opinion appellee could furnish purchasers of the bonds.

Second: That appellant was to be paid out of a fund of $2500.00 allowed by the owners of the land to appellee and in no other way.

When these two questions of fact are disposed of all errors assigned and argued upon this appeal will be settled accordingly.

The first proposition as a question of fact calls for the judgment of the court as to whether appellant was employed as claimed by appellant or appellee. Appellant claims and in this is supported by witness Hoss that he was employed by appellee to investigate the title, prepare bonds, etc. The correspondence between appellant and appellee show that such service was being rendered from the 1st of August to the 1st of September, 1910, and that appellee upon this proposition is his denial without corroboration of either witness or correspondence. Indulging and giving to the trial court the benefit of that presumption that only competent evidence was considered we do not, when all the competent evidence is considered, justify the finding. Where the judgment is against the manifest weight of the evidence so that it permitted to stand the court would satisfied there had been a miscarriage of justice it should set aside.

The second proposition when the evidence is considered is without either evidence or merit. There is no evidence in the record that appellant ever agreed with appellee to accept employment and take fee and expenses out of the expense fund of $2500.00 or to look to the Priest Orchard Company of [illegible] Rose who was President and principal owner thereof for his fee and expenses. The appellee does not say appellant agreed to this. It would be necessary to bind appellant to at least show by some evidence that appellant knew of this arrangement acquiesced in it, and agreed to accept employment that way.

We are satisfied from the undisputed evidence in this case the judgment is contrary to the manifest weight of the evidence and ought to be set aside and new trial awarded. The judgment will therefore be reversed and cause remanded.

Reversed and remanded.

* ** *** * **

(Not to be reported in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

Clerk of the Appellate Court.

OPINION

Fee $

1303 ~~1277~~

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Dalerno

vs.

No. 19

March Term, 1914.

Mo. & Ill. Coal Co

~~ERROR TO~~
APPEAL FROM

188 I.A. 343

Circuit COURT

St Clair COUNTY

TRIAL JUDGE

Hon. W. E. Hadley

Term No. 19. Agenda No. 39.

March Term, A. D. 1914.

Joseph Salerno, Appellee, vs. Missouri & Illinois Coal Company, Appellant.	Appeal from Circuit Court of St.Clair County.

188 I.A. 343

Opinion by Harris, J.

This suit was brought by appellee against appellant and tried upon the charges made in an amended declaration consisting of four counts, and the plea of not guilty. The first count of the declaration aside from the formal allegations in substance charged:

That while appellee on the 2nd day of March, 1912, was mining coal from room nine off the 12th south entry there existed in the roof of said room at or near the face thereof a lot of rock, slate and other substance which was likely to come down at any time and injure those working in the room and finding that props, caps and timbers were necessary to support the roof thereof at said point, he then and there demanded of the mine manager of appellant that he then and there deliver at the usual place a number of seven foot props, Caps and timbers to rescue said roof at said point for their own safety; that appellant wilfully failed and omitted through its mine manager to make delivery thereof as demanded, whereof and while appellee was loading coal into a car at the place aforesaid and passing beneath and under said loose rock, slate and other substance, by reason of said wilful failure of appellant to furnish said props, caps and timbers a lot of said over-hanging rock and other sub-

Term No. 10. Agenda No. 39.

March Term, A. D. 1914.

Joseph Salerno, Appellee, vs. Missouri & Illinois Coal Company, Appellant.	Appeal from Circuit Court of St.Clair County.

Opinion by Hartis, J. **188 I.A. 343**

This suit was brought by appellee against appellant and tried upon the charges made in an amended declaration consisting of four counts, and the plea of not guilty. The first count of the declaration sets forth the formal allegations in substance charged:

That while appellee on the 2nd day of March, 1912, was mining coal from room nine off the 12th south entry there existed in the roof of said room at or near the face thereof a lot of rock, slate and other substance which was likely to come down at any time and injure those working in the room and finding that prope, cape and timbers were necessary to support the roof thereof at said point, he then and there demanded of the mine manager of appellant that he then and there deliver at the usual place a number of seven foot prope, Cape and timbers to rescue said roof at said point for their own safety; that appellant wilfully failed and omitted through its mine manager to make delivery thereof as demanded, whereof and while appellee was loading coal into a car at the place aforesaid and passing beneath and under said loose rock, slate and other substance, by reason of said wilful failure of appellant to furnish said prope, cape and timbers a lot of said over-hanging rock and other sub-

stance fell and permanently injured appellee to the damage of $3,000.00.

The second count after describing locality, condition, etc., as in the first count charges that the mine examiner failed to inspect the roof of said room at said point and to observe said dangerous condition of said roof thereat and to make record thereof in a book kept for that purpose, before the miners were permitted to enter said room for work in consequence whereof appellee was injured, etc., as alleged in said first count.

The third count alleges the same general condition as first count and charges that the mine examiner of appellant entered said room and inspected the same and observed said loose rock, clod, dirt, slate and other substance in said roof at said point and wilfully failed to place a conspicuous mark or sign thereat as notice to keep out and wilfully failed to make a daily record of the same in a book kept for that purpose before the miners were permitted to enter said mine for work; by means whereof appellee was injured, etc., as alleged in the first count.

The fourth count describes the same general conditions at the point in question at the time and as alleged in first count and charges that appellee on the 2nd day of March, 1912, demanded of mine manager of appellant props to secure the roof at said point and he was then and there informed by said mine manager that appellant had no props of the length required in said room at said point and that mine manager then and there informed appellee that he would go into said room and examine said roof to observe whether it was safe for work and said mine manager went into said room andmade an examination of the roof thereof and reported to appellee that the roof was all right

stance fell and permanently injured appellee to the damage of $3,000.00.

The second count after describing locality, condition, etc., as in the first count charges that the mine examiner failed to inspect the roof of said room at said point and to observe said dangerous condition of said roof thereat and to make thereof in a book kept for that purpose, before the miners were permitted to enter said room for work in consequence whereof appellee was injured, etc., as alleged in said first count.

The third count alleges the same general condition as first count and charges that the mine examiner of appellant entered said room and inspected the same and observed said loose rock, clod, dirt, slate and other substance in said roof at said point and wilfully failed to place a conspicuous mark or sign thereat as notice to keep out and wilfully failed to make a daily x record of the same in a book kept for that purpose before the miners were permitted to enter said mine for work; by means whereof appellee was injured, etc., as alleged in the first count.

The fourth count describes the same general conditions at the point in question at the time and as alleged in first count and charges that appellee on the 2nd day of March, 1912, demanded of mine manager of appellant prope to secure the roof at said point and he was then and there informed by said mine manager that appellant had no prope of the length required in said room at said point and that mine manager then and there informed appellee that he would go into said room and examine said roof to observe whether it was safe for work and said mine manager went into said room andmade an examination of the roof thereof and reported to appellee that the roof was all right

and reasonably safe, and then and there directed appellee to proceed with his work of loading coal and appellee in pursuance of said order and relying upon the examination made by said mine manager did proceed at point in question, by reason whereof he was permanently injured, etc., as alleged in first count.

Upon the issues so joined a trial was had by jury and a verdict returned in favor of appellee for the sum of $1,250.00. Motion by appellant for new trial, which was overruled, judgment and this appeal.

Appellant in presenting its reasons for a reversal of the judgment assigns and argues but two general propositions.

First: That under the evidence as applied to each count of the declaration there cannot be a recovery.

Second: That the trial court committed reversible error in refusing to give appellant's first refused instruction.

Under appellant's first general proposition before entering upon details as to fact it will save time and space to state some of the facts as to conditions as they existed on March 2, 1912, which applies to each of the four counts:

Appellee and his buddy Paul Palermo were miners of considerable experience familiar with the terms used and rules of mining in and about the mine in question. Appellant's Mine Superintendent Rauth, Acting Mine Manager Butler, Assistant Mine Manager Branden and Mine Examiner Montieth were all men of experience in and about mines of this kind, familiar with different conditions, dangers and the rules of mining. That in appellant's mine appellee and his buddy laid off room nine off the 12th south entry, which at the time of the accident had been cut from 12 to 21 feet wide, some of the time widened and a part of the time narrowed to in the neighborhood of 60 feet to face

and reasonably safe, and then and there directed appellee to proceed with his work of loading coal and appellee in pursuance of said order and relying upon the examination made by said mine manager did proceed at point in question, by reason whereof he was permanently injured, etc., as alleged in first count.

Upon the issues so joined a trial was had by jury and a verdict returned in favor of appellee for the sum of $1,[illegible].00. Motion by appellant for new trial, which was overruled, judgment and this appeal.

Appellant in presenting its reasons for a reversal of the judgment assigns and argues but two general propositions.

First: That under the evidence as applied to each count of the declaration there cannot be a recovery.

Second: That the trial court committed reversible error in refusing to give appellant's first refused instruction.

Under appellant's first general proposition before entering upon details as to fact it will save time and space to state some of the facts as to conditions as they existed on March 2, 1912, which applies to each of the four counts:

Appellee and his buddy Paul Palermo were miners of considerable experience familiar with the terms used and rules of mining in and about the mine in question. Appellant's line superintendent Smith, Acting Mine Manager Butler, Assistant Mine Manager Brenden and Mine Examiner Doughtith were all men of experience in and about mines of this kind, familiar with different conditions, dangers and the rules of mining. That in appellant's mine appellee and his buddy laid off room nine off the 2 12th south entry, which at the time of the accident had been cut from 12 to 21 feet wide, some of the time widened and a part of the time narrowed to in the neighborhood of 80 feet in face

of coal. The vein of coal was from 6 to 6½ feet thick. The roof was what was called a rock or slate roof. The kind of roof was the reason for narrowing and widening the room. That what was called whitetop in the roof was familiar to both appellee and the witnesses heretofore named ofappellant as of bluish color and of a brittle nature. That it might be discovered and known before falling or it might not. That the roof might upon examination sound all right and soon break and fall. That the precautions as to width of room and frequent examinations of the roof was because all the witnesses recognized the dangers of the kind of a roof in said room nine. That the method of making safe such a roof is by taking down the clod, bastard or stone or by, if the piece is too large, putting in numerous props. That the piece that fell was white top six to eight inches thick, seven or eight feet long, and three to four feet wide, located seven or eight feet from face of coal. That to have secured it by props would have required props, about seven feet in length. That but one prop was set in this room and no attempt had been made to remove this stone clod or white top from the roof. That the mine examiner was in mine and this room on the morning of the accident but placed no danger marks upon any part of this roof. That the mine manager was in room and sounded this portion of the roof on day of accident, about two hours previous to accident, pronounced it safe and ordered the room widened. That this visit and examination was made because he knew the roof was changing. The above are practically undisputed facts.

Appellee and Paul Palermo, his buddy say this condition of the roof began to show white top and dangerous on Tuesday before the accident on Saturday and on Friday coal was undercut,

of coal. The vein of coal was from 6 to 6½ feet thick. The roof was what was called a rock or slate roof. The kind of roof was the reason for narrowing and widening the room. That what was called whitetop in the roof was familiar to both appellee and the witnesses heretofore named ofappellant as of bluish color and of a brittle nature. That it might be discovered and known before falling or it might not. That the roof might upon examination sound all right and soon break and fall. That the precautions as to width of room and frequent examinations of the roof was because all the witnesses recognized the dangers of the kind of a roof in said room mine. That the method of making safe such a roof is by taking down the clod, bastard or stone or by, if the piece is too large, putting in numerous props. That the piece that fell was white top six to eight inches thick, seven or eight feet long, and three to four feet wide, located seven or eight feet from face of coal. That to have secured it by props would have required props, about seven feet in length. That but one prop was set in this room and no attempt had been made to remove this stone clod or white top from the roof. That the mine examiner was in mine and this room on the morning of the accident but placed no danger marks upon any part of this roof. That the mine manager was in room and sounded this portion of the roof on day of accident, about two hours previous to accident, pronounced it safe and ordered the room widened. That this visit and examination was made because he knew the roof was changing. The above are practically undisputed facts.

Appellee and Paul Palerme, his buddy say this condition of the roof began to show white top and dangerous on Tuesday before the accident on Saturday and on Friday coal was uncovered,

loading was done and in the evening coal was shot down. That on Friday evening appellee through his buddy demanded of the mine manager seven foot props be sent down to make roof safe. The same request was made on Saturday morning and that Mine Manager said he would send seven foot props if they had them and on Saturday morning said if they did not have them he would come down. That there were no props in room except six foot prop that was set by appellee.

Appellant's witnesses say that no seven foot props were ordered. That the custom of ordering props was by black board at bottom of mine. That props from six to six and a half feet were in room at time and were of sufficient length for use at this place. That appellee was familiar with these conditions and should have removed the white top or substance that fell.

Applying the above to appellant's arguments as to first count of declaration upon the question of whether seven foot props were demanded, whether props were needed and whether there were in the room at time props of sufficient length to support the roof were questions of fact submitted to the jury and upon which there was a sufficient dispute to warrant the court in accepting the verdict of the jury as binding.

The application of the same rule in considering the facts under the second and third counts of the declaration that from the evidence a dangerous condition appeared on Thursday and Friday before accident and should have been made a matter of record and marked by mine examiner on Saturday morning was a question in dispute and upon which evidence was offered.

If white top was discovered on Thursday and Friday and was known to make a roof dangerous the mine examiner should have discovered it. There being evidence of this fact the question

loading was done and in the evening coal was shot down. That on Friday evening appellee through his buddy demanded of the mine manager seven foot prope be sent down to make roof safe. The same request was made on Saturday morning and that mine manager said he would send seven foot prope if they had them and on Saturday morning said if they did not have them he would come down. That there were no prope in room except six foot prop that was set by appellee.

Appellant's witnesses say that no seven foot prope were ordered. That the custom of ordering prope was by black board at bottom of mine. That prope from six to six and a half feet were in room at time and were of sufficient length for use at this place. That appellee was familiar with these conditions and should have removed the white top or substance that fell.

Applying the above to appellant's arguments as to first count of declaration upon the question of whether seven foot prope were demanded, whether prope were needed and whether there were in the room at time prope of sufficient length to support the roof were questions of fact submitted to the jury and upon which there was a sufficient dispute to warrant the court in accepting the verdict of the jury as binding.

The application of the same rule in considering the facts under the second and third counts of the declaration that from the evidence a dangerous condition appeared on Thursday and Friday before accident and should have been made a matter of record and marked by mine examiner on Saturday morning was a question in dispute and upon which evidence was offered.

If white top was discovered on Thursday and Friday and was known to make a roof dangerous the mine examiner should have discovered it. There being evidence of this fact the question

whether an unsafe condition existed which could by the exercise of reasonable diligence on the part of mine examiner been discovered was a question for the jury to determine, and if found to be dangerous then it was the duty of the mine examiner to have marked it and made a record accordingly.

The fourth count of the declaration the evidence of an examination by mine manager, a direction to appellee to work, due care upon the part of appellee, and the evidence as to direction of the assistant mine manager to take down the rock, clod or stone and appellee's failure to obey and the furnishing by appellant to appellee of a reasonably safe place to work were all submitted to the jury and if a recovery in this case and the sustaining of this verdict depended upon this count, the evidence and the application of the law might bring about a different result. But as we are of the opinion that there is sufficient evidence under the statutory counts to sustain the judgment and a general verdict under one good count to sustain it is sufficient for not encumbering the record with a discussion of the evidence applicable to this count and law, of willfully violating orders, equal means of knowledge, assurance of safety, risks assumed and changed conditions cited by appellant and applicable to this count.

Under the three statutory counts it is argued that even if the mining statute was by appellant violated, there is no showing that the violation was the proximate cause of the injury. The proximate cause is not necessarily the beginning but the efficient cause, such a cause in the absence of proof of which the court would say as a matter of law the injury would not have occurred.

whether an unsafe condition existed which could by the exercise of reasonable diligence on the part of mine examiner been discovered was a question for the jury to determine, and if found to be dangerous then it was the duty of the mine examiner to have marked it and made a record accordingly.

The fourth count of the declaration the evidence of an examination by mine manager, a direction to appellee to work, and care upon the part of appellee, and the evidence as to direction of the assistant mine manager to take down the rock, clod or stone and appellee's failure to obey and the furnishing by appellant to appellee of a reasonably safe place to work were all submitted to the jury and if a recovery in this case and the sustaining of this verdict depended upon this count, the evidence and the application of the law might bring about a different result. But as we are of the opinion that there is sufficient evidence under the statutory counts to sustain the judgment and a general verdict under one good count to sustain it is sufficient for not encumbering the record with a discussion of the evidence applicable to this count and law, of willfully violating orders, equal means of knowledge, assurance of safety, risks assumed and changed conditions cited by appellant and applicable to this count.

Under the three statutory counts it is argued that even if the mining statute was by appellant violated, there is no showing that the violation was the proximate cause of the injury. The proximate cause is not necessarily the beginning but the efficient cause, such a cause in the absence of proof of which the court would say as a matter of law the injury would not have occurred.

If the court is to say as a matter of law what is and what is not the proximate cause there must be absolutely no showing that the violation of the statute had anything to do with the injury. This for the reasons given under each count of the declaration is a question of fact and the jury's finding on the same for the same reasons we refuse to disturb.

Appellant in its brief covers considerable space in citation of law which upon examination we conclude was cited more particularly as we have said upon liability under fourth count. The wilful violation of a statute is nothing more than a conscious violation thereof and that determined from all the facts and circumstances in evidence.

Appellant complains that the court did not give one instruction which read, as follows:

"The Court instructs the jury that if you believe from the evidence that the plaintiff knew the roof in his working place was loose and liable to fall and injure him, and that knowing this continued to work under such dangerous roof and was injured in consequence thereof, then you should find the defendant not guilty as to the fourth count of the plaintiff's declaration.

Appellant's injury, if any, in the Court's refusal to give this instruction could only arise under the fourth count the common law count based upon an assurance of safety. The instruction was properly refused because it ignored the examination of the mine manager, his assurances of safety and the principle of law that although appellee may have known there was some danger, yet if the danger was not such that an ordinarily prudent person would refuse to work, then he might continue.

The refusal of this instruction could not be reversible

If the court is to say as a matter of law what is and what is not the proximate cause there must be absolutely no showing that the violation of the statute had anything to do with the injury. This for the reasons given under each count of the declaration is a question of fact and the jury's finding on the same for the same reasons we refuse to disturb.

Appellant in its brief covers considerable space in citation of law which upon examination we conclude was cited more particularly as we have said upon liability under fourth count, the wilful violation of a statute is nothing more than a conscious violation thereof and that determined from all the facts and circumstances in evidence.

Appellant complains that the court did not give one instruction which read, as follows:

"The Court instructs the jury that if you believe from the evidence that the plaintiff knew the roof in his working place was loose and liable to fall and injure him, and that knowing this continued to work under such dangerous roof and was injured in consequence thereof, then you should find the defendant not guilty as to the fourth count of the plaintiff's declaration.

Appellant's injury, if any, in the Court's refusal to give this instruction could only arise under the fourth count the common law count based upon an assurance of safety. The instruction was properly refused because it ignored the examination of the mine manager, his assurances of safety and the principle of law that although appellee may have known there was some danger, yet if the danger was not such that an ordinarily prudent person would refuse to work, then he might continue.

The refusal of this instruction could not be reversible

error because in appellant's eighth and ninth given instructions are practically given the same law as asked for in the refused instruction. Finally this instruction applied to fourth count of declaration only and as we have decided there was evidence sufficient to support the verdict and judgment under the statutory counts the refusal of this instruction becomes immaterial.

We find no reversible error in this record and the judgment will be affirmed.

Affirmed.

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(Not to be reported in full.)

error because in appellant's eighth and ninth given instructions are practically given the same law as asked for in the refused instruction. Finally this instruction applied to a court of declaration only and as we have decided there was evidence sufficient to support the verdict and judgment under the statutory counts the refusal of this instruction becomes immaterial.

We find no reversible error in this record and the judgment will be affirmed.

Affirmed.

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(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Hubacek

vs.

No. 25

March Term, 1914.

Mobile RR Co et al

~~ERROR TO~~
APPEAL FROM

188 I.A. 345

Circuit COURT

Madison COUNTY

TRIAL JUDGE

Hon. Geo. A. Crow

Term No. 25. Agenda No. 22.

March Term, A. D. 1914.

John Huback, Appellee, vs. Wabash Railroad Company and Illinois Terminal Railroad Company, Appellants.	Appeal from Circuit Court of Madison County.

Opinion by Harris, J.

This suit was brought by appellee against appellants to recover damages for personal injuries.

The declaration filed consisted of two counts which in substance alleged: That on November 6, 1911, and prior thereto, the defendant the Wabash Railroad Company, was possessed of a certain railroad, extending through and within a part of the city of Edwardsville, Madison County, which crossed High Street in said city and which the defendants, Wabash Railroad Company and Illinois Terminal Railroad Company were jointly using and operating; that defendant Wabash Railroad Company was possessed of a certain engine and train of two coaches which were being operated by the defendants, jointly, and defendants jointly had in charge of said train, as conductor, Philip Zimmerscheid; that plaintiff (here appellee) was a joint servant of said defendants working as a brakeman on said train under the orders of said Philip Zimmerscheid; that defendant required and said train was run backward with coaches in front of engine along said railroad toward said High Street crossing and plaintiff as brakeman, was required by defendants to and did ride on the forward platform of the first coach of said train as said train was being

Term No. 35. Agenda No. 46.

March Term, A. D. 1914.

John Hubpck, Appellee, vs. Wabash Railroad Company and Illinois Terminal Railroad Company, Appellants.	Appeal from Circuit Court of Madison County.

Opinion by Harris, J.

This suit was brought by appellee against appellants to recover damages for personal injuries.

The declaration filed consisted of two counts which in substance alleged: That on November 6, 1911, and prior thereto, the defendant the Wabash Railroad Company, was possessed of a certain railroad, extending through and within a part of the city of Edwardsville, Madison County, which crossed High Street in said city and which the defendants, Wabash Railroad Company and Illinois Terminal Railroad Company were jointly using and operating; that defendant Wabash Railroad Company was possessed of a certain engine and train of two coaches which were being operated by the defendants, jointly, and defendants jointly were had in charge of said train, as conductor, Philip Zimmerschied; that plaintiff (here appellee) was a joint servant of said defendants working as a brakeman on said train under the orders of said Philip Zimmerschied; that defendant required and said train was run backward with coaches in front of engine along said railroad toward said High Street crossing and plaintiff as brakeman, was required by defendants to and did ride on the forward platform of the first coach of said train as said train was being

run, and there sound an air whistle as said train approached the crossing aforesaid.

That the engine and each of said coaches for the purpose of stopping same was equipped with air brakes which could be operated and set by a certain lever at the railing of the platform on said coach upon which plaintiff was riding, as aforesaid, and that when said brakes were in reasonably safe adjustment and repair the said train, when running at the rate of 15 miles per hour could be stopped quickly within a distance of 120 feet, by throwing or setting of said brakes in emergency by means of the lever aforesaid; that the defendants negligently failed to use reasonable care to keep said air brakes in reasonably safe condition and repair and negligently permitted the same to be and remain out of repair and in an unsafe condition for use, in this that the piston in each of the brakes upon said coaches had too much travel, namely ten inches of travel when the piston should have not to exceed six inches of travel so that the air brakes when thrown or set in emergency, by means of the lever aforesaid, would not act with sufficient power nor quickness to stop said train quickly, and the said train when running at the rate of 15 miles per hour could not be stopped in a less distance than 300 feet, all of which was well known or in the exercise of reasonable care, could have been known to defendants and of which plaintiff was ignorant. By means whereof on said day, while the said train was being operated backward along said railroad at the rate of 15 miles per hour toward said High Street crossing, and while the plaintiff in the scope of his employment and in the exercise of due care for his own safety was riding on the foremost platform of said train, when a certain team and wagon were being driven upon said crossing, and when in order to avoid said train striking said

run, and there sound an air whistle as said train approached the crossing aforesaid.

That the engine and each of said coaches for the purpose of stopping same was equipped with air brakes which could be operated and set by a certain lever at the railing of the platform on said coach upon which plaintiff was riding, as aforesaid, and that when said brakes were in reasonably safe adjustment and repair the said train, when running at the rate of 15 miles per hour could be stopped quickly within a distance of 120 feet, by throwing or setting of said brakes in emergency by means of the lever aforesaid; that the defendants negligently failed to use reasonable care to keep said air brakes in reasonably safe condition and repair and negligently permitted the same to be and remain out of repair and in an unsafe condition for use, in this that the piston in each of the brakes upon said coaches had too much travel, namely ten inches of travel when the piston should have not to exceed six inches of travel so that the air brakes when thrown or set in emergency, by means of the lever aforesaid, would not act with sufficient power nor quickness to stop said train quickly, and the said train when running at the rate of 15 miles per hour could not be stopped in a less distance than 300 feet, all of which was well known or in the exercise of reasonable care, could have been known to defendants and of which plaintiff was ignorant. By means whereof on said day, while the said train was being operated backward along said railroad at the rate of 15 miles per hour toward said High Street crossing, and while the plaintiff in the scope of his employment and in the exercise of due care for his own safety was riding on the forward platform of said train, when a certain team and wagon were being driven upon said crossing, and when in order to avoid said train striking said

team and wagon it became necessary to stop said train quickly and within a distance of 230 feet and the plaintiff for that purpose threw and set said air brakes in emergency by means of the lever aforesaid, by reason of the negligence of the defendants and the unsafe condition and repair of said air brakes aforesaid the said air brakes failed to act properly and effectively and failed to stop said train within the distance of 230 feet and the said train ran and struck with great force and violence against said team and wagon, and thereby plaintiff was thrown with great force and violence from the foremost platform and coach upon which he was riding to the ground, his skull fractured, and he was permanently injured, his right arm and hand permanently injured and disfigured and he was otherwise permanently injured in body and limb to the damage of $15,000.00.

A plea of general issue filed, a trial had, and verdict of jury finding issues for plaintiff, damages $7,500.00. Motion for new trial overruled; judgment on verdict and appeal to this court. The credibility of the witnesses in this case has been argued at some length, but from an examination of the record and the opportunity of trial court to observe and pass upon their credibility we accept the judgment of court and jury upon this branch of the case as final. The facts involved in this case appear that appellee, 27 years of age on November 6, 1911, was and had been for about six weeks prior thereto a brakeman upon the train in question. That prior to this employment he had been employed as brakeman on freight trains. That he was a strong and able-bodied man. That the defendants jointly operated the train inquestion consisting of an engine and two coaches between Edwardsville and Alton and Edwardsville

team and wagon it became necessary to stop said train suddenly and within a distance of 230 feet and the plaintiff for that purpose threw and set said air brakes in emergency by means of the lever aforesaid, by reason of the negligence of the defendants and the unsafe condition and repair of said air brakes aforesaid the said air brakes failed to act properly and effectively and failed to stop said train within the distance of 230 feet and the said train ran and struck with great force and violence against said team and wagon, and thereby plaintiff was thrown with great force and violence from the forward platform and coach upon which he was riding to the ground, his skull fractured, and he was permanently injured, his right arm and hand permanently injured and disfigured and he was otherwise permanently injured in body and limb to the damage of $15,000.00.

A plea of general issue filed, a trial had, and verdict of jury finding issues for plaintiff, damages $7,500.00. Motion for new trial overruled; judgment on verdict and appeal to this court. The credibility of the witnesses in this case has been argued at some length, but from an examination of the record and the opportunity of trial court to observe and [illegible] upon their credibility we accept the judgment of court and jury upon this branch of the case as final. The facts involved in this case appear that appellee, 27 years of age on December 6, 1911, was and had been for about six weeks prior thereto a brakeman upon the train in question. That prior to this employment he had been employed as brakeman on freight trains. That he was a strong and able-bodied man. That the defendants jointly operated the train in question consisting of an engine and two coaches between Edwardsville and Alton and Edwardsville

and Edwardsville Junction where they connected with main line of the Wabash. The Junction is about two miles north of Edwardsville depot of appellants. The train run head on from Edwardsville to the Junction and returned with coaches ahead of engine driven backward. Appellee was required to ride on the return trip on the foremost platform of the front coach in the train as it proceeded southward from the Junction to Edwardsville and to sound an air whistle as a warning when the train approached street crossings, and apply the air brakes when required.

The engine and coach were equipped with Westinghouse air brakes having 12 inch brake cylinders, which hung under the center of each coach and beneath the engine. The tail hose of the train pipe line controlling the air brakes hooked over the railing of the platform on which appellee was required to ride, and this tail hose was provided with two angle cocks or levers, one of which was used by appellee in sounding the air whistle, and the other to apply air brakes which could be applied from platform of this coach as well as from the engine. Appellee had made one service application of the brakes prior to time in question. He had the day previous observed the piston travel of the brakes and noticed that they ran out a distance of nine or ten inches when the brakes were applied by the engineer at the depot in Edwardsville, but appellee says he did not know at that time what the piston travel had to do with the proper operation of the brakes, and that he did not know anything about the adjustment of air brakes nor what was a proper piston travel. That a proper piston travel is from five to six inches. When the piston travel exceeds eight inches the brake-

and Edwardsville Junction where they connected with main line of the Wabash. The Junction is about two miles north of Edwardsville depot of appellants. The train run head on from Edwardsville to the Junction and returned with caboose ahead of engine driven backward. Appellee was required to ride on the return trip on the forward platform of the front coach in the train as it proceeded southward from the Junction to Edwardsville and to sound an air whistle as a warning when the train approached street crossings, and apply the air brakes when required.

The engine and coach were equipped with Westinghouse air brakes having 12 inch brake cylinders, which hung under the center of each coach and beneath the engine. The tail hose of the train pipe line controlling the air brakes hooked over the railing of the platform on which appellee was required to ride, and this tail hose was provided with two angle cocks or levers, one of which was used by appellee in sounding the air whistle, and the other to apply air brakes which could be applied from platform of this coach as well as from the engine. Appellee had made one service application of the brakes prior to time in question. He had the day previous observed the piston travel of the brakes and noticed that they ran out a distance of nine or ten inches when the brakes were applied by the engineer at the depot in Edwardsville, but appellee says he did not know at that time what the piston travel had to do with the proper operation of the brakes, and that he did not know anything about the adjustment of air brakes nor what was a proper piston travel. That a proper piston travel is from five to six inches. When the piston travel exceeds eight inches the brake-

ing force is destroyed. That appellee had never applied the brakes in emergency previous to the accident. That appellants had at the time of the accident an inspector of cars by name of Cummings, who performed his duties at the Junction and every day looked over the coaches in this train and if the brakes on these cars were out of order he was supposed to repair them. He inspected the coaches and brakes about nine o'clock of the morning of the accident. He had about 25 years' experience in inspecting cars and brakes of cars. He says he examined the brakes the next morning after accident, measured the piston travel and found it to be about six inches and brakes not in need of repair. Witness Schmidt says as a locomotive fireman he is familiar with air brakes, and that he noticed these brakes three or four days before accident and on evening of accident that they were not in proper adjustment and that the piston travel was about nine to ten inches.

Appellee the afternoon of November 6, 1911, was upon this train as heretofore described, equipped as before stated, approaching the High Street crossing, a street running in an easterly and westerly direction. Across High Street towards the north and immediately west and parallel to appellant's main track is a switch track known as mill track; located at the northwest corner of the intersection of mill track with High Street is a building 165 to 170 feet long called the warehouse or cooper shop, and on the other side of High Street and opposite the warehouse is another building known as the mill building, except about 22 feet immediately south of High Street, this building extends to next street, South College Street. On the afternoon in question appellee says, as we approached High Street crossing looking south he noticed a team of mules when they approached crossing from behind warehouse. The train was

ing force is destroyed. That supplies and water carried the brakes in emergency previous to the accident. Just approximately had at the time of the accident an inspector of cars by name of Cummings, who performed his duties at the junction and every day looked over the coaches in this train and if the brakes on these cars were out of order he was supposed to repair them. He inspected the coaches and brakes about nine o'clock of the morning of the accident. He had about 8 years' experience in inspecting cars and brakes of cars. He says he examined the brakes the next morning after accident, measured, the piston travel and found it to be about [illegible] brakes not in need of repair. Witness somewhat says he a locomotive fireman he is familiar with air brakes, and that he noticed these brakes three or four days before accident and on evening of accident that they were not in proper adjustment and that the piston travel was about nine to ten inches.

Appellee the afternoon of November 6, 1921, was upon this train as heretofore described, equipped as before stated, approaching the High Street crossing, a street running in an easterly and westerly direction. Across High Street toward the north and immediately west and parallel to appellant's main track is a switch track known as mill track; located at the northwest corner of the intersection of mill track with High Street is a building 165 to 170 feet long called the warehouse or cooper shop, and on the other side of High Street and opposite the warehouse is another building known as the mill building, except about 22 feet immediately south of High Street, this building extends to next street, South College Street. In the afternoon in question appellee says, as we approached High Street crossing looking south he noticed a team of mules when they approached crossing from behind warehouse. The train was

about the north end of the warehouse to 200 feet from town when discovered is the evidence of some of the other eye witnesses. That the location of the eye witnesses and their opportunity for seeing gives rise to a difference of opinion as to distance from High Street at which air was applied, consequently the difference of opinion as to the effects of the application.

The appellant's argument upon their assignment of error is confined to four propositions.

First: That the preponderance of evidence does not prove that the brakes were defective or that such condition was the proximate cause of the accident.

Second: If the brakes were defective appellee is charged with knowledge of it, and assumed the risk of injury resulting from their operation.

Third: Assuming brakes were out of repair or defective at the time of the accident, appellants had no notice of such condition as would render them liable to appellee.

Fourth: That appellant was entitled to a new trial on the ground of newly discovered evidence.

Appellant upon the question of preponderance of the evidence discusses in detail the evidence of the different witnesses, their credibility, experience and knowledge of the subject about which they were testifying. The court will not, where there is a contrariety of evidence, after an examination of the record, determine as a mathematical proposition where the preponderance lies, that being within the province of the jury. There was in this case sufficient evidence from all angles upon whether or not the brakes were defective and whether such defect was the cause of injury to make it a question for

about the north end of the warehouse to 200 feet from here when discovered is the evidence of none of the other witnesses. That the location of the eye witnesses and their opportunity for seeing gives rise to a difference of opinion as to distance from High Street at which air was applied, consequently the difference of opinion as to the effects of the application.

The appellant's argument upon their assignment of error is confined to four propositions.

First: That the preponderance of evidence does not prove that the brakes were defective or that such condition was the proximate cause of the accident.

Second: If the brakes were defective appellee is charged with knowledge of it, and assumed the risk of injury resulting from their operation.

Third: Assuming brakes were out of repair or defective at the time of the accident, appellants had no notice of such condition as would render them liable to appellee.

Fourth: That appellant was entitled to a new trial on the ground of newly discovered evidence.

Appellant upon the question of preponderance of the evidence discusses in detail the evidence of the different witnesses, their credibility, experience and knowledge of the subject about which they were testifying. The court will not, where there is a contrariety of evidence, after an examination of the record, determine as a mathematical proposition where the preponderance lies, that being within the province of the jury. There was in this case sufficient evidence from all witnesses upon whether or not the brakes were defective and whether such defect was the cause of injury to make it a question for

the jury, and unless the verdict of the jury is against the manifest weight of the evidence it will not be set aside and with this we are satisfied on this proposition.

The second proposition, knowledge of appellee of defect and assumption of risk. These are questions of fact to be determined by jury as other questions of fact. It is true in this State under the rule of law that appellee in actions of this kind must show due care and under this rule a servant must prove by a preponderance of evidence the following propositions:

First: The existence of some defect in the construction or operation of the air-brake which rendered it inefficient in doing the work required.

Second: That appellants in the exercise of ordinary care would have or could have had knowledge of such defect; and Third: That appellee did not know of the defect and did not have equal opportunities with appellants of knowing it. (Lake Erie & Western Railroad Co.vs. Wilson, 189 Ill., 89. McCormick Machine Co. vs. Zakzewski, 200 Ill., 522.)

The rule in this state is in actions for personal injury that the plaintiff must allege and prove that he was free from negligence contributory to the injury. It is true that to charge the servant with negligence he must not only know or have the means of knowing by the exercise of ordinary care of the defect, but must also know that the defect renders the appliance unsafe to use, and he is not bound to make an inspection for latent defects. Where want of knowledge is not susceptible of direct proof it may be inferred from circumstances and the appellee may be aided by the presumption that a person does not voluntarily incur danger or the risk of death. Knowledge or want of knowledge of a defect may be inferred from

the jury, and unless the verdict of the jury is against the manifest weight of the evidence it will not be set aside and with this we are satisfied on this proposition.

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First: The existence of some defect in the construction or operation of the air-brake which rendered it inefficient in doing the work required.

Second: That appellants in the exercise of ordinary care would have or could have had knowledge of such defect; and

Third: That appellee did not know of the defect and did not have equal opportunities with appellants of knowing it. (Lake Erie & Western Railroad Co.vs. Ellison, 189 Ill., 89. Schermick Machine Co. vs. Zakzewski, 200 Ill., 522.)

The rule in this state is in actions for personal injury that the plaintiff must allege and prove that he was free from negligence contributory to the injury. It is true that to charge the servant with negligence he must not only know or have the means of knowing by the exercise of ordinary care of the defect, but must also know that the defect rendered the appliance unsafe to use, and he is not bound to make an inspection for latent defects. Mere want of knowledge is not an susceptible of direct proof it may be inferred from circumstances and the appellee may be aided by the presumption that a person does not voluntarily incur danger or the risk of death. Knowledge or want of knowledge of a defect may be inferred from

the circumstances but by whatever evidence the fact may be shown, the burden of proof in that regard rests on the plaintiff. (Swift & Co. vs. Gaylord, 229 Ill., 330.)

The servant is under no primary liability to investigate for latent defects to test the fitness and safety of the tools, fixtures or appliances provided him by the master. He may assume that they are fit and safe, and though the circumstances may be such a servant is chargeable with knowledge of such defects as are patent and obvious and of such defects as in the exercise of ordinary care he ought to have knowledge of. The servant is not to be deemed as having notice or knowledge of such defects and insufficiencies as can be ascertained only by investigation and inspection for the purpose of ascertaining that there is no danger. (Armour Vs. Brazeau, 191 Ill.,117.)

While there is no absolute duty to keep appliances in safe condition there is a duty to use reasonable care to keep them fit, and this duty may require inspection at reasonable intervals and the employment of such tests as will reveal the condition of the machinery or appliances. This duty of inspection rests upon the employer and not upon the employee and depends upon the character of the machinery or appliances, since ordinary care may require an inspection oftener in one case than in another. (Armour vs. Brazeau,191 Ill., 117. Wrisley Co. vs. Burk, 203 Ill., 250.)

While it is true that an employee assumes such risk of the employment as is usually incident thereto and of the extraordinary hazards of which he has notice, or which in the usual exercise of his faculties he ought to have notice, he does not take the risk or dangers known to the master which can be avoided by him in the exercise of reasonable care. He assumes the

the circumstances but by whatever evidence the fact may be shown, the burden of proof in that regard rests on the plaintiff. (Swift & Co. vs. Gaylord, 22% Ill., 136.)

The servant is under no primary liability to investigate for latent defects to test the fitness and safety of the place, fixtures or appliances provided him by the master. He may assume that they are fit and safe, and though the circumstances may be such a servant is chargeable with knowledge of such defects as are patent and obvious and of such defects as in the exercise of ordinary care he ought to have knowledge of. The servant is not to be deemed as having notice or knowledge of such defects and insufficiencies as can be ascertained only by investigation and inspection for the purpose of ascertaining that there is no danger. (Armour vs. Brazeau, 151 Ill., 117.)

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While it is true that an employee assumes such risk of his employment as is usually incident thereto and of the extraordinary hazards of which he has notice, or which in the usual exercise of his faculties he ought to have notice, he does not take the risk or dangers known to the master which may be avoided by him in the exercise of reasonable care. He assumes the

risk more or less hazardous of the service of which he is engaged but he has a right to presume that all proper attention shall be given to his safety and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and preventable by ordinary care and precaution on the part of his employer. (Alton Paving Brick Co. vs. Hudson, 176 Ill., 270.)

The evidence in this case upon knowledge of appellee and assumption of risk was sufficient to make it a question for the jury and it was properly submitted.

The third proposition that if brakes were out of repair and defective at time of accident there is a failure to show notice of such condition as would make appellants liable.

Notice of a condition may not be capable of direct proof and is not required. Notice may be proven by facts and circumstances which facts and circumstances the master has notice of or an opportunity to have knowledge of which is not open to the servant, as in this case an inspector who had from day to day inspected these brakes for latent defects and such inspector held to a knowledge of how such defects affected the service. A duty to inspect and test for defects that would not be chargeable to the servant who had only to do with the application. While the master is not charged with an absolute duty to keep appliances safe he is charged with the duty to use reasonable care to keep them fit and reasonably safe for service.

The extent of that duty and what would be a faithful performance depends upon the character of the machinery or appliances since reasonable care may require inspection oftener in one case than in another. (Wrisley Co. vs. Burke, 203 Ill., [illegible]).

risk more or less hazardous of the service of which he is engaged but he has a right to presume that all proper attention would be given to his safety and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and preventable by ordinary care and precaution on the part of his employer. (Alton Paving Brick Co. vs. Dawson, 176 Ill., 270.)

The evidence in this case upon knowledge of appellee and assumption of risk was sufficient to make it a question for the jury and it was properly submitted.

The third proposition that if brakes were out of repair or defective at time of accident there is a failure to show notice of such condition as would make appellants liable.

Notice of a condition may not be capable of direct proof and is not required. Notice may be proven by facts and circumstances which facts and circumstances the master has notice of or an opportunity to have knowledge of which is not open to the servant, as in this case an inspector who had from day to day inspected these brakes for latent defects and such inspector or held to a knowledge of how such defects effected the service. A duty to inspect and test for defects that would not be chargeable to the servant who had only to do with the application. While the master is not charged with an absolute duty to keep appliances safe he is charged with the duty to use reasonable care to keep them fit and reasonably safe for service.

The extent of that duty and what would be a faithful performance depends upon the character of the machinery or appliances since reasonable care may require inspection oftener in one case than in another. (Wrisley Co. vs. Burke, 203 Ill., 462.)

Appellants in this case recognized this duty to the extent of having Witness Cummings inspect these brakes every day for some defect that appellee was not presumed to be familiar with. Whether or not this inspector was competent and performed the duty and whether appellants exercised reasonable care in the performance of its duty were questions of fact determined by the jury. Appellants contend that they were entitled to a new trial on ground of newly discovered evidence; from the examination of the affidavits, there was no showing of proper diligence and the evidence would have been cumulative. There was no abuse of discretion in overruling the motion for new trial.

There is no reversible error in this record and the judgment will be affirmed.

Affirmed.

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(Not to be reported in full.)

Appellants in this case recognized this duty to the extent of having witness Cummings inspect these brakes every day for some defect that appellee was not presumed to be familiar with. Whether or not this inspector was competent and performed his duty and whether appellants exercised reasonable care in the performance of its duty were questions of fact determined by the jury. Appellants contend that they were entitled to a new trial on ground of newly discovered evidence; from the examination of the affidavits, there was no showing of proper diligence and the evidence would have been cumulative. There was no abuse of discretion in overruling the motion for new trial.

There is no reversible error in this record and the judgment will be affirmed.

Affirmed.

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(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Montgomery et al

vs.

Dickok et al

No. 28

March Term, 1914.

~~ERROR TO~~
APPEAL FROM

188 I.A. 348

Circuit **COURT**

Crawford **COUNTY**

TRIAL JUDGE

Hon. E. E. Newlin

Term No. 28. Agenda No. 9.

March Term, A. D. 1914.

Samuel R. Montgomery, Alice Montgomery and Herman Montgomery, Appellees, Vs. O. Hickok, W. C. Turner, Fred Zeigler, D. E. Jones, J. W. White and W. E. Stathers, Appellants.	Appeal from Circuit Court of Crawford County.

188 I.A. 348

Opinion by Harris, J.

Suit in assumpsit was brought by appellees to recover from appellants the sum of One thousand Dollars alleged to be due from appellants upon an oil and gas lease. The amended declaration consisted to two counts. The first count declaring upon said lease, and setting it out verbatim, and also alleging that appellants by various assignments and conveyances became the owners of said lease as a copartnership under name of Bess Oil Company and that said company, pursuant to the terms and conditions of said lease drilled a well on said lands which said well when completed was a paying oil well and by means of whereof appellants became indebted to appellees in sum of Two thousand Dollars and thereafter on July 2nd, 1909, paid to appellees the sum of One thousand Dollars on said debt.

The second count of said amended declaration was the consolidated common counts with statements of account suedon. The appellants J. W. White, W. C. Turner and W. E. Stathers, each, for himself, files the plea of general issue, verified plea denying joint liability, and plea of statute of frauds. That afterwards appellees file two additional counts. The first additional count alleging ownership of land in Samuel R. Montgomery, the execution of the lease by appellees to Fred D. Zeigler,

Term No. 28. Docket No. 5.

March Term, A. D. 1914.

Samuel H. Montgomery, Alice Montgomery and Herman Montgomery, Appellees,	Appeal from Circuit Court of Crawford County.
Vs.	
O. Hickok, W. C. Turner, Fred Zeigler, D. E. Jones, J. W. White and W. E. Stathers, Appellants.	

Opinion by Harris, J.

Suit in assumpsit was brought by appellees to recover from appellants the sum of One thousand Dollars alleged to be due from appellants upon an oil and gas lease. The amended declaration consisted to two counts. The first count declaring upon said lease, and setting it out verbatim, and also alleging that appellants by various assignments and conveyances became the owners of said lease as a copartnership under name of Bass Oil Company and that said company, pursuant to the terms and conditions of said lease drilled a well on said lands which said well when completed was a paying oil well and by reason whereof appellants became indebted to appellees in sum of Two thousand Dollars and thereafter on July 2nd, 1909, said to appellees the sum of One thousand Dollars on said debt.

The second count of said amended declaration was the consolidated common counts with statements of account annexed. The appellants J. W. White, W. C. Turner and E. E. Stathers, each, for himself, files the plea of general issue, verified plea denying joint liability, and plea of statute of fraud. That afterwards appellees file two additional counts. The first additional count alleging ownership of land in Samuel H. Montgomery, the execution of the lease by appellees to Fred E. Zeigler,

the covenant of Fred Zeigler for himself, his successors, heirs, executors, administrators and assigns to pay two thousand dollars in case the first well drilled should be a paying oil and gas well, the assignment by Zeigler to appellants Hickok, Turner, Jones, White and Stathers of certain interests in leases: that all appellants jointly took possession and jointly as owners and copartners drilled a well which when completed was a paying oil and was the first well drilled pursuant to the terms and conditions of said lease, whereupon appellants became indebted to appellees in sum of two thousand dollars, of which said sum appellants did afterwards pay to appellees the sum of one thousand dollars.

The second additional count being on motion of appellees and by leave of court withdrawn is immaterial on the appeal.

The appellees file a bill of particulars in said cause. Appellants refile their pleas and appellees demur to pleas one, two and three, which demurer was overruled. Appellees file replications to said pleas. By agreement a jury was waived and a trial of said cause by the court. The suit at the conclusion of the introduction of evidence was dismissed as to defendant Fred Zeigler on appellees' motion.

The Court found the issues in favor of appellees and against defendants O. Hickok, W. C. Turner, C. L. Jones, J. W. White and W. E. Stathers in the sum of One thousand Dollars damages and upon the finding entered judgment in favor of appellees and against W. C. Turner, J. W. White and W. E. Stathers for the sum of One thousand dollars and costs of suit, the defendants of whom the court had jurisdiction, and on appellees' motion ordered scire facias to issue against defendants

the covenant of Fred Zeigler for himself, his successors, heirs, executors, administrators and assigns to pay two thousand dollars in case the first well drilled should be a paying oil and gas well, the assignment by Zeigler to appellants Hickok, Turner, Jones, White and Stathers of certain interests in leases that all appellants jointly took possession and jointly became owners and copartners drilled a well which when completed was a paying oil and was the first well drilled pursuant to the terms and conditions of said lease, whereupon appellants became indebted to appellees in sum of two thousand dollars, of which said sum appellants did afterwards pay to appellees the sum of one thousand dollars.

The second additional count being on motion of appellees and by leave of court withdrawn is immaterial on the appeal.

The appellees file a bill of particulars in said cause. Appellants refile their pleas and appellees demur to pleas one, two and three, which demurrer was overruled. Appellees file replications to said pleas. By agreement a jury was waived and a trial of said cause by the court. The suit at the conclusion of the introduction of evidence was dismissed as to defendant Fred Zeigler on appellees' motion.

The Court found the issues in favor of appellees and against defendants O. Hickok, W. G. Turner, C. W. Jones, J. W. White and W. E. Stathers in the sum of One thousand Dollars damages and upon the finding entered judgment in favor of appellees and against W. G. Turner, J. W. White and W. W. Stathers for the sum of One thousand dollars and costs of suit, the defendants of whom the court had jurisdiction, and on appellees' motion ordered suit issue to issue against defendants

C. Hickok and D. E. Jones to show cause why they should not be made parties to the judgment; to these rulings and judgment of the Court appellants W. C. Turner, J. W. White and .. .. Stathers except and bring this appeal.

The appellees on the 5th day of September, 1907, executed and delivered to W. D. Zeigler a lease to the Northeast Quarter of the Southeast Quarter of Section 15, Township 5 North, Range 11 West, containing 40 acres more or less, situated in Township of Montgomery, County of Crawford, State of Illinois, waiving all rights under Homestead Exemption laws; consideration One Dollar, in hand paid by second party, and of the covenants and agreements hereinafter contained on part of the party of second part to be paid, kept and performed, does demise, lease and let to second parties, successors or assigns, for sole and only purpose of mining and operating for oil and gas laying pipe lines, constructing tanks, buildings and other structures to take care of said product; that lease should remain in force for ten years from date and as long thereafter as oil or gas is produced therefrom by second party, successors or assigns. Provided party of second part, successors or assigns upon the payment of one dollar to parties of first part, heirs or assigns may surrender said lease for cancellation thereby all payments and liabilities shall cease. All covenants and agreements between the parties therein contained to extend to their heirs, executors, administrators, successors and assigns.

Among the covenants and agreements of second party therein contained are the following;

1st. To deliver to first parties in pipe line free of cost the equal one-sixth part of all oil produced and saved on said premises.

O. Hickok and D. K. Jones to show cause why they should not be made parties to the judgment; to these rulings and judgment of the Court appellants W. C. Turner, J. W. White and [illegible] Ste-ere except and bring this appeal.

The appellees on the 5th day of September, 1907, executed and delivered to F. D. Keigler a lease to the Northeast quarter of the Southeast quarter of Section 15, Township 5 North, Range 11 West, containing 40 acres more or less, situated in Town-ship of Montgomery, County of Crawford, State of Illinois, waiv-ing all rights under Homestead Exemption laws; consideration One Dollar, in hand paid by second party, and of the covenants and agreements hereinafter contained on part of the party of second part to be paid, kept and performed, does demise, lease and let to second parties, successors or assigns, for sole and only purpose of mining and operating for oil and gas laying pipe lines, constructing tanks, buildings and other structures to take care of said product; that lease should remain in force for ten years from date and as long thereafter as oil or gas is produced therefrom by second party, successors or assigns. Provided party of second part, successors or assigns upon payment of one dollar to parties of first part, heirs or as-signs may surrender said lease for cancellation thereby all payments and liabilities shall cease. All covenants and agree-ments between the parties therein contained to extend to their heirs, executors, administrators, successors and assigns.

Among the covenants and agreements of second party therein contained are the following:

1st. To deliver to first parties in pipe line free of cost the equal one-sixth part of all oil produced and saved on said premises.

2nd. To pay for gas produced and furnished first parties gas free of charge for home consumption.

3rd. To pay for gas produced from oil well. To complete a well within sixty days or pay at rate of $25.00 per month in advance for each month completion is delayed. That the completion of five wells shall be and operate as a full liquidation of all rent under this provision during the remainder of term of this lease. The right to withdraw machinery and castings at any time to second party.

4. Second party agrees to place rig on lease within thirty days etc. Second party agrees to pay first party when stake is set for first well the sum of $400.00 and two thousand dollars additional in case first well is paying well.

That under the different assignments offered in evidence Zeigler had assigned to W. C. Turner, J. W. White, Q. Rickok, D. E. Jones and W. E. Stathers in September and October, 1907, and they had accepted said assignments subject to the terms and conditions thereof.

That in December, 1907, the said parties entered upon said described land under said lease and commenced the drilling of an oil well, completing the same in February, 1908. That after the completion of the well and before July 1, 1909, Beecher & Harrington bought the interest of Rickok. That about July 1, 1909, the several parties paid in proportion to their interest on this $2,000.00 due on first well the sum of One thousand dollars, Beecher & Harrington paying in place ofRickok.

The appellants urge under their assignment of errors six reasons for the reversal of this judgment.

First: They are not parties to the lease and by the assignments to them they did not assume and agree to keep and

2nd. To pay for gas produced and furnished first parties gas free of charge for home consumption.

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That under the different assignments offered in evidence Zeigler had assigned to P. O. Turner, L. W. White, O. Hickok, D. K. Jones and W. A. Stathers in September and October, 1907, and they had accepted said assignments subject to the terms and conditions thereof.

That in December, 1907, the said parties entered upon said described land under said lease and commenced the drilling of an oil well, completing the same in February, 1908. That after the completion of the well and before July 1, 1909, Beecher & Harrington bought the interest of Hickok. That about July 2, 1909, the several parties paid in proportion to their interest on this $2,000.00 due on first well the sum of one thousand dollars, Beecher & Harrington paying in place of Hickok.

The appellants urge under their assignment of errors six reasons for the reversal of this judgment.

First: They are not parties to the lease and by the assignments to them they did not assume and agree to keep and

perform any of the covenants and conditions of the lease imposed upon the lessee.

Second: The agreement to pay two thousand dollars in case the first well drilled is a paying well is not a covenant running with the land, and was neither rent nor royalties. That the agreement to pay said sum was an extension of credit by lessors to Zeigler, the lessee.

Third; That the assignment subject to the terms and conditions of this lease does not create a personal liability because it is not a covenant running with the land.

Fourth: Because the agreement to pay two thousand dollars in case the first well is a paying well is the personal covenant of Zeigler and is within the statute of frauds as to appellants and void as to them, and part performance or offer to perform will not remove the bar.

Fifth: If there was a legal liability to pay the two thousand dollars in case the first well was a paying well the evidence does not show the well was a paying well.

Sixth: The defendants to said suit were not partners in the absence of an agreement express or implied and, if any liability exists it is a several liability and not joint.

The first and second reasons argued by appellant is upon the theory that the provision for the payment of the $2,000.00 upon completion of first well is a personal covenant between lessor and lessee and is not binding upon the assignees of the lessee. The assignees took possession under the lease and drilled the well in question as they had a right to do under the lease and when they did so the Court had a right to presume they elected to accept the provisions of the lease in this regard for the

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betterment of their holdings thereby enhancing the value of appellees' property. If the covenant between lessor and lessee relates to a thing not in esse but which is yet to be done upon the land tending to enhance its value or to render its enjoyment more beneficial to the owner or occupant the assignees if named are also bound. (Taylor's Landlord and Tenant 9th Ed. Vol. 1, Sec. 260.)

In this case the assignees had the option of proceeding under the lease or not proceeding, electing to proceed they did so as assignees in privity of estate. If the assignees had not elected to proceed and a suit had been instituted for a failure to proceed involving privity of contract a different question might arise. This was a covenant between lessor and lessee, when assigned, accepted by assignees and acted upon by them, that run with the land. This is true whether in the use of terms under this lease you call it rent or bonus. The effect of it was to enhance the value of both owner and assignees' interests in the property in question.

This $2,000.00 when lease was assigned may have been a bonus between lessor and assignees, but when they entered into possession and drilled the well it affected the thing demised and was no longer collateral to the leasehold estate. The holding upon these two propositions are in accord with the holdings in cases cited by appellants including the case of Fisher vs. Guffey, 193 P., 393, which is a case not in point in this case but that suit was based upon the assignment failing to contain the words sufficient to require assignees to pay a personal obligation.

The third and fourth propositions are disposed of by the holding on first and second. That it is a covenant running

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with the land, accepted and acted upon by assignees, therefore not personal and not an agreement to answer for the debt or obligation of another.

The fifth proposition as a question of fact becomes a question of law because appellants assert that the holding of the trial court that a well producing a sufficient amount of oil to pay operating expenses and some profit is a paying well. That the court should have held that unless the well declared upon has or would produce oil in such quantities when marketed at current price will pay the cost of drilling, equipping, and operating and a reasonable profit to the operator on the sum necessarily expended, it is not a paying well. In the trial no account was taken of drilling and equipping this well. Why should there be it is said assignees were taking a chance and to suffer loss if they did not succeed. A chance they were willing to take and the owner was willing to let them have his land and put up with the hazard and inconveniences, to have a chance. If equipment and drilling are to be taken into consideration why not the damages on the other side. The holding of the Court upon the evidence was the more reasonable and we think the correct theory as to what is and what is not a paying well. That the evidence sustains the finding of the court that the well paid operating expenses and a profit should be sustained where the finding is not against the manifest weight of evidence. The argument that this should be left to the judgment and good faith of the operator as against the other interested party, unless the contract or lease so provides, seems to be without reason to support it.

The sixth proposition denying joint liability is without merit. The undisputed facts appear that these appellants, with

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The fifth proposition as a question of fact assumes a question of law because appellants assert that the holding of the trial court that a well producing a sufficient amount of oil to pay operating expenses and some profit is a paying well. That the court should have held that unless the well declared upon has or would produce oil in such quantities when marketed at current price will pay the cost of drilling, equipping, and operating and a reasonable profit to the operator on the use as necessarily expended, it is not a paying well. In the trial no account was taken of drilling and equipping this well. Why should there be it is said negligence were taking a chance and to suffer loss if they did not succeed. A chance they were willing to take and the owner was willing to let them have his land and put up with the hazard and inconvenience, to have a chance. If equipment and drilling are to be taken into consideration why not the damages on the other side. The decision of the Court upon the evidence was the more reasonable and we think the correct theory as to what is and what is not a paying well. That the evidence sustains the finding of the court that the well paid operating expenses and a profit should be sustained where the finding is not against the manifest weight of evidence. The argument that this should be left to the judgment and good faith of the operator as against the other interested party, unless the contract or lease so provides, seems to be without reason to support it.

The sixth proposition denying joint liability is without merit. The undisputed facts appear that these appellants, with

Jones and Hicock, accepted this lease, entered into possession of the premises, drilled and equipped this well under the name and style of the Bess Oil Company, what the arrangements were between them as to a partnership being immaterial in this case. They held themselves out as a partnership, invited the public to deal with them as such. Appellees did deal with them, permitted them to drill and operate as a partnership, which could not have been done in any other manner. They each contributed and paid a debt due from the partnership and the fact that they had no partnership account should not control. When this record is considered there is the further reason that the errors assigned by appellants should not prevail: That the appellants when they accepted the assignment of this lease drilled the well in question and paid one thousand dollars on the amount due they placed a construction upon this contract that it was a covenant running with the land, that the well was a paying and that the two thousand dollars was due appellees. This construction should and does bind appellants in this case and the judgment will therefore be affirmed.

Affirmed.

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(Not to be reported in full.)

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Affirmed.

***

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Bell, adm't -

vs.

No. 39

March Term, 1914.

E. St Louis & Sub-Ry Co -

~~ERROR TO~~
APPEAL FROM

188 I.A. 350

Circuit COURT

Madison COUNTY

TRIAL JUDGE

Hon. Thos. M. Jett

Term No. 39. Agenda No. 48.

March Term, A. D. 1914.

Mary E.Bell, Administratrix of the Estate of John Bell, Deceased, Appellee, vs. East St. Louis & Suburban Railway Company, Appellant.	Appeal from Circuit Court of Madison County.

188 I.A. 350

Opinion by Harris, J.

An action in case brought by appellee against appellant to recover $10,000.00 damages resulting from the injuring and killing of John Bell, deceased.

The declaration consists of three counts, the first and second counts in substance aver that appellant was, on the 29th day of January, 1913, the owner and operating an electric railway on Main Street in Collinsville, Illinois, carrying passengers for reward, that it became and was the duty of appellant to use reasonable care in running its cars upon and along Main Street to avoid injuring persons who might be traveling along and upon said street in the exercise of due care for their own safety; that appellant so negligently and carelessly operated, controlled and managed one of its cars on Main Street near its intersection with Guernsey Street, that said car was driven upon and against the team and wagon of appellee's intestate, while in the exercise of due care and caution for his own safety; by reason whereof appellee's intestate, John Bell, received injuries from which he died February 8, 1913. The appointment of appellee administratrix leaving surviving appellee his widow and Linnea Bell, daughter, heirs at law and next of kin damages

Term No. 39. Agenda No. 48.

March Term, A. D. 1914.

Mary E. Bell, Administratrix of the Estate of John Bell, Deceased, Appellee, va. West St. Louis & Suburban Railway Company, Appellant.	Appeal from Circuit Court of Madison County.

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in sum of $10,000.00.

The second count in addition to formal allegations alleges that appellee's intestate in due care was driving westward on Main Street near the intersection of Guernsey Street, appellant's car approached from the rear with an unobstructed view of said wagon, and through its servants in charge of said car failed to exercise reasonable care to have said car under control as not to run against said team and wagon and thereby carelessly and negligently ran said car against said team and wagon whereby John Bell was violently thrown from said wagon to the ground and received injuries from which he died.

The third count in addition to formal averments alleges wanton and wilful negligence. The court, however, at the conclusion of appellee's evidence instructed the jury to find appellant not guilty under third count.

To this declaration appellant filed plea of not guilty, a trial, case submitted to jury under first and second counts, a verdict in favor of appellee and against appellant for sum of $5,250.00. Motion for new trial overruled judgment on verdict and this appeal.

Some of the material facts in this case are undisputed and appear in substance as follows:

Main Street in collinsville, 40 feet wide with the railway track of appellant in center extends in a northeasterly and southwesterly direction; Guernsey street crosses it at right angles. John Bell, appellee's intestate, a man thirty-eight years of age, about three o'clock in the afternoon of January 29,1913, was driving a mule team hitched to a delivery wagon west on Main Street approaching the intersection of Guernsey Street and

in sum of $10,000.00.

The second count in addition to formal allegations alleges that appellee's intestate in due care was driving westward on Main Street near the intersection of Guernsey Street, appellant's car approached from the rear with an unobstructed view of said wagon, and through its servants in charge of said car failed to exercise reasonable care to have said car under control as not to run against said team and wagon and thereby carelessly and negligently ran said car against said team and wagon whereby John Bell was violently thrown from said wagon to the ground and received injuries from which he died.

The third count in addition to formal averments alleges wanton and willful negligence. The court, however, at the conclusion of appellee's evidence instructed the jury to find appellant not guilty under third count.

To this declaration appellant filed plea of not guilty, a trial, case submitted to jury under first and second counts, a verdict in favor of appellee and against appellant for sum of $2,250.00. Motion for new trial overruled judgment on verdict and this appeal.

Some of the material facts in this case are undisputed and appear in substance as follows:

Main Street in Collinsville, 40 feet wide with the railway track of appellant in center extends in a northeasterly and southwesterly direction; Guernsey street crosses it at right angles. John Bell, appellee's intestate, a man thirty-eight years of age, about three o'clock in the afternoon of January 29,1913, was driving a mule team hitched to a delivery wagon west on Main Street approaching the intersection of Guernsey Street and

when a short distance west of said intersection he was struck by a car of appellant going in the same general direction, the car striking the mules and the left front wheel of his wagon, he was thrown from the wagon and injured, from which injuries he died February 8, 1913.

There is a dispute as to what appellee's intestate was doing just prior to and at time of accident, and what signals, if any, were given by appellant and whether or not the car was under control, and these disputed facts and the law to be applied is the contention between the parties in this court.

In short it is argued by appellant that the trial court should have directed a verdict at close of the evidence and that the verdict is contrary to law and against the greater weight of the evidence. A small amount of space is devoted by appellant objecting to ruling of court admitting evidence, the refusal of one instruction and that the damages are excessive with reference to these objections they are without merit. The evidence objected to was the conclusion of the witness, the instruction was not in form, and the law had been given to the jury in another instruction and if it is a case where appellant is liable the damages were not excessive.

Recurring again to the main contention, parties agree that two of the material allegations of the declaration to be proven by appellee by a preponderance of the evidence are: that appellee's intestate was in the exercise of due care and caution for his own safety.

Second that appellant was careless and negligent in handling and controlling its car and that such carelessness and negligence caused the injury to appellee's intestate.

That there was some evidence upon which a jury might find

when a short distance west of said intersection he was struck by a car of appellant going in the same general direction, the car striking the mules and the left front wheel of his wagon, he was thrown from the wagon and injured, from which injuries he died February 8, 1912.

There is a dispute as to what appellee's intestate was doing just prior to and at time of accident, and what signals, if any, were given by appellant and whether or not the car was under control, and these disputed facts and the law to be applied is the contention between the parties in this court.

In short it is argued by appellant that the trial court should have directed a verdict at close of the evidence and that the verdict is contrary to law and against the greater weight of the evidence. A small amount of space is devoted by appellant objecting to ruling of court admitting evidence, the refusal of one instruction and that the damages are excessive with reference to these objections they are without merit. The evidence objected to was the conclusion of the witness, the instruction was not in form, and the law had been given to the jury in another instruction and if it is a case where appellant is liable the damages were not excessive.

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both allegations proven and under the law the court committed no error in refusing to direct a verdict.

However, upon the question of the verdict being against the manifest weight of the evidence, the verdict being the result of a consideration of something other than the real issues involved, and not in accord with substantial justice are questions that present themselves on a motion for new trial and to this court on appeal. The consideration of these questions by the trial court on a motion for new trial are governed by a different rule of law than that under consideration in directing or refusing to direct a verdict.

Where a question of fact has been properly submitted to the jury upon motion for new trial is the first time the court becomes responsible in any way for the finding, but when so called upon it becomes the finding of the Court as well as jury. And where the trial court or appellate court are satisfied that the verdict of jury is against manifest weight of the evidence to permit it to stand would mean that great injustice, not only in that particular case, but in all cases where it might be insisted the verdict of a jury should be conclusive no matter what the evidence might be. (Gull vs. Beckstein, 173 Ill.,187; C & A. R. R. Co. vs. Hernrich, 157 Ill., 388; I. C. R. R. Co. vs. Haecher, 110 App., 102.)

Now for a consideration of the facts in this case as they appear from the evidence:

John Bell, a resident of this small town, familiar with its streets and railroad, a driver that brought him in contact with cars and track, driving west on this street and turning his team across track with car coming within 100 feet. This state-

both allegations proven and under the law the court committed no error in refusing to direct a verdict.

However, upon the question of the verdict being against the manifest weight of the evidence, the verdict being the result of a consideration of something other than the real issues involved, and not in accord with substantial justice are questions that present themselves on a motion for new trial and to this court on appeal. The consideration of these questions by the trial court on a motion for new trial are governed by a different rule of law than that under consideration in directing or refusing to direct a verdict.

Where a question of fact has been properly submitted to the jury upon motion for new trial is the first time the court becomes responsible in any way for the finding, but when so called upon it becomes the finding of the court as well as jury. And where the trial court or appellate court are satisfied that the verdict of jury is against manifest weight of the evidence to permit it to stand would mean that great injustice, not only in that particular case, but in all cases where it might be initiated the verdict of a jury should be conclusive no matter what the evidence might be. (Gull vs. Beckstein, 173 Ill., 187; C & A. R. R. Co. vs. Herrick, 157 Ill., 388; I. C. R. R. Co. vs. Hacker, 110 App., 102.)

Now for a consideration of the facts in this case as they appear from the evidence:

John Bell, a resident of this small town, familiar with its streets and railroad, a driver that brought him in contact with cars and track, driving west on this street and turning his team across track with car coming within 100 feet. This state-

ment is made from the evidence that is not contradicted. The nules and front wheel of wagon were hit and that is not disputed by appellee, and this could not have been done had the collision occurred from the rear or as deceased was leaving track toward north with rear wheels of his wagon skidding as claimed by appellee. Three witnesses for appellee are all that pretend to give any account of deceased at the time and just before the accident. Bardsley Grater and Mrs. Phleger and all say he was driving west near center of street and neither say they saw him do anything to avoid injury. Other witnesses say, who were disinterested, that deceased was driving west a safe distance north of track, and went west of intersection of Guernsey Street turned his team across street.

These witnesses, seven in number, being residents of Collinsville and passengers on car, with one exception, the motorman. The physical conditions and undisputed facts in accord with this testimony it would be against all precedent to hold that the verdict of jury finding deceased was in exercise of due care should not be set aside.

There is no evidence that the car was being run at a high rate of speed. The undisputed evidence is it stopped in from eight to fifteen feet after accident. There is the evidence of several witnesses that gong was sounded repeatedly back about two blocks and up to the place where the accident occurred.

Without giving in detail the evidence of the several witnesses the case as made would not sustain a verdict on either the due care of deceased or the negligence of the Company, because the judgment and verdict is against the manifest weight of the evidence the judgment will be reversed and cause remanded.

REVERSED AND REMANDED.

(Not to be reported in full.)

ment is made from the evidence that is not contradicted. The rules and front wheel of wagon were hit and that is not disputed by appellee, and this could not have been done had the collision occurred from the rear or as deceased was leaving track toward north with rear wheels of his wagon skidding as claimed by appellee. Three witnesses for appellee are all that pretend to give any account of deceased at the time and just before the accident. Bardsley Grafter and Mrs. Fulmer all say he was driving west near center of street and neither say they saw him do anything to avoid injury. Other witnesses say, who were disinterested, that deceased was driving west a safe distance north of track, and went west of intersection of Guernsey Street turned his team across street.

These witnesses, seven in number, being residents of Collinsville and passengers on car, with one exception, the motorman. The physical conditions and undisputed facts in accord with this testimony it would be against all precedent to hold that the verdict of jury finding deceased was in exercise of due care should not be set aside.

There is no evidence that the car was being run at a high rate of speed. The undisputed evidence is it stopped in from eight to fifteen feet after accident. There is the evidence of several witnesses that song was sounded repeatedly back about two blocks and up to the place where the accident occurred.

Without giving in detail the evidence of the several witnesses the case as made would not sustain a verdict on either the due care of deceased or the negligence of the Company, because the judgment and verdict is against the manifest weight of the evidence the judgment will be reversed and cause remanded.

REVERSED AND REMANDED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

1307 ~~1253~~

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the [illegible] *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Fuller & Livingston

vs.

No. 45

March Term, 1914.

American Car & Foundry Co.

~~ERROR TO~~
APPEAL FROM

188 I.A. 352

Circuit COURT

Madison COUNTY

TRIAL JUDGE

Hon. Geo. A. Gross

Term No. 45. [illegible]

March Term A. D. 1914.

Heller & Livingston, Appellants, vs. American Car & Foundry Company, Appellee.	Appeal from Circuit Court of Madison County.

188 I.A. 352

Opinion by Harris, J.

This suit was commenced before a Justice of the Peace by appellants to recover an an assignment of wages given to them by one Floyd Aiken for wages earned while in the employ of appellee. The case was appealed to the Circuit Court and upon a trial in that court by jury at the close of evidence offered by appellant on appellee's motion the court directed by instruction a verdict finding for appellee. Without a motion by appellant for new trial being either entered or filed the court entered judgment on the verdict, appellant excepting and prosecuting an appeal, which brings the case to this court for review.

Floyd Aiken on the 27th day of November, 1911, executed an assignment of all wages and salary commissions and credits of every nature due and to become due and payable to him within the next six months from the American Car and Foundry Co., and succeeding employer. Aiken was in the employ of appellee in December and January 1912-1913 but there is no evidence of employment at the time or previous to the assignment.

Appellant was [illegible] at the time of bringing suit a partnership and at the time of trial a corporation succeeding to all the

Term No. 46. Docket No. 23.

March Term A. D. 1924.

Heller & Hartington, Appellants, vs. American Car & Foundry Company, Appellee.	Appeal from Circuit Court of Madison County.

188 I.A. 359

Opinion by Barrie, J.

This suit was commenced before a justice of the peace by appellant to recover on an assignment of wages given to them by one Floyd Aiken for wages earned while in the employ of appellee. The case was appealed to the Circuit Court and upon a trial in that court by jury at the close of evidence offered by appellant on appellee's motion the court directed by instruction a verdict finding for appellee. Without a motion by appellant for new trial being either entered or filed the court entered judgment on the verdict, appellant excepting and prosecuting an appeal, which brings the case to this court for review.

Floyd Aiken on the 27th day of November, 1921, executed an assignment of all wages and salary commissions and compensation to become due and to become due and payable to him during the next ensuing six months from the American Car and Foundry Co., and succeeding December as employer. Aiken was in the employ of appellee in January 1922-1923 but there is no evidence of employment at the time or previous to the assignment.

Appellant was at the time of trial, at the time of bringing suit a partnership and a corporation succeeding to all the

property and assets of the partnership. That appellee had never received notice of the assignment and had paid [illegible] the wages earned by him.

A party taking and accepting assignments of the [illegible] relied upon to bind a third party not a privy to the contract under the law assume some responsibility which is not satisfied by saying we have done enough to put the third party upon inquiry. A Party bringing suit must prove all the necessary elements to entitle it to recover and in the manner the rules of law require.

From an examination of the record in this case there are several reasons any one of which would be sufficient to sustain the judgment of the trial court, but appellant is satisfied to rely in the presentation of this appeal upon one of the grounds of its assignment of errors. That judgment of trial court should be reversed because the judgment was based on a finding by the court that no sufficient notice of the assignment had been, by lawful means, served upon appellee.

The argument of appellant is based upon this alleged error and as we cannot agree with appellants upon this proposition and do agree with the trial court in directing a verdict it would serve no good purpose to discuss the facts or law of this case further than to dispose of the question raised by appellant. The sufficiency of the notice of assignment, the relation of the parties, their interest in the subject matter of the suit and that the law requires actual notice of the assignment shall be proven.

If the copy of the notice offered in evidence was otherwise competent as a copy, there is no evidence nor offer to prove that the original was enclosed in an envelope, deposited in a place for receiving United States mail with proper amount postage directed to appellant. That [illegible] the [illegible]

property and assets of the partnership. That appellee had never received notice of the assignment and had paid him the wages earned by him.

A party taking and accepting assignments of the kind here relied upon to bind a third party not a party to the contract under the law assumes some responsibility which is not satisfied by saying we have done enough to put the third party upon inquiry. A party bringing suit must prove all the necessary elements to entitle it to recover and in the manner the rules of law require.

From an examination of the record in this case there are several reasons any one of which would be sufficient to warrant the judgment of the trial court, but appellant is entitled to rely in the presentation of this appeal upon one of the grounds of its assignment of errors. That judgment of trial court should be reversed because the judgment was based on a finding by the court that no sufficient notice of the assignment had been, by lawful means, served upon appellee.

The argument of appellant is based upon this alleged error and as we cannot agree with appellants upon this proposition and do agree with the trial court in directing a verdict it would serve no good purpose to discuss the facts or law of this case further than to dispose of the motion raised by appellant. The sufficiency of the notice of assignment, the relation of the parties, their interest in the subject matter of the suit and that the law requires actual notice of the assignment shall be proven.

If the copy of the notice offered in evidence was otherwise competent as a copy, there is no evidence nor offer to prove that the original was enclosed in an envelope, deposited in a place for receiving United States mail with proper postage directed to appellant. That inasmuch as the testimony

receipt of itself does not prove anything as to what was received by appellee at that time from appellant and is only to be considered as a link in the chain of evidence necessary to show that appellee had actual notice of the claim of appellant. There being no proper foundation laid for the introduction of the copy of the notice it was properly excluded. There does not appear to be any evidence of notice to appellee of appellant's assignment upon which this suit is brought and without it appellant could not recover. The judgment will therefore be affirmed.

Affirmed.

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(Not to be reported in full).

receipt of itself does not prove anything as to when was received by appellee at that time from appellant and is only to be considered as a link in the chain of evidence necessary to show that appellee had actual notice of the claim of appellant. There being no proper foundation laid for the introduction of the copy of the notice it was properly excluded. There does not appear to be any evidence of notice to appellee of appellant's assignment upon which this suit is brought and without it appellant could not recover. The judgment will therefore be affirmed.

Affirmed.

* * * * * * * * * * * * * * *

(Not to be reported in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

1308 1254

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the [illegible] *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Weinstein

vs.

No. 46

March Term, 1914.

Garcinski

~~BINDON TO~~
APPEAL FROM

188 I.A. 353

City COURT

E. St Louis ~~COUNTY~~

TRIAL JUDGE

Hon. R. H. Flanigan

Term No. 46. [illegible]

March Term A. D. 1914.

M. Weinstein, Appellant, vs. Pete Garcinski, Appellee.	Appeal from City Court of East St. Louis, St. Clair County.

Opinion by Harris, J. 188 I.A. 353

This is a suit commenced by appellant against appellee before a Justice of the Peace in East St. Louis to recover the sum of $100.00 which appellant claimed to be due him from appellee. The Justice of the Peace sustained the issue of attachment and rendered judgment in favor of appellant and against appellee for the amount claimed and costs. The appellee perfected an appeal to the City Court of East St. Louis, where upon trial before a jury, the jury returned a verdict in favor of appellee, and motion for new trial being overruled the court entered judgment on verdict and against appellant for costs from which judgment appellant prosecutes his appeal to this Court.

The facts in this case are not numerous, but nevertheless leave the truth somewhat uncertain.

Appellant early in September, 1913, was in the grocery and meat business in East St. Louis and appellee on the Salem Railway a short distance from the place of business of appellant. The appellee had a number of checks in his possession earned for divers persons given by the Steel Foundry Company which he took to the place of business of appellant and told appellant that he was in need of more funds to cash checks. Appellant took the checks which appellant says amounted to $452.45, and appellee

Term No. 46. Agenda No. 17.

Argued Term A. D. 1914.

M. Weinstein, Appellant, vs. Pete Gorotnekt, Appellee.	Appeal from City Court of East St. Louis, St. Clair County.

Opinion by Harris, J. **188 I.A. 353**

This is a suit commenced by appellant against appellee before a Justice of the Peace in East St.Louis to recover the sum of $100.00 which appellant claimed to be due him from appellee. The Justice of the Peace sustained the issue of attachment and rendered judgment in favor of appellant and against appellee for the amount claimed and costs. The Appellee perfected an appeal to the City Court of East St.Louis, where upon trial before a jury, the jury returned a verdict in favor of appellee, and motion for new trial being overruled the court entered judgment on verdict and against appellant for costs from which judgment appellant prosecutes his appeal to this Court.

The facts in this case are not numerous, but nevertheless leave the truth somewhat uncertain.

Appellant early in September, 1913, was in the grocery and meat business in East St.Louis and appellee in the saloon business a short distance from the place of business of appellant. The appellee had a number of checks in his possession which he had given by the usual courtesy for cash to appellant to the place of business of appellant and told appellant that he was in need of more funds to cash checks. Appellant took the checks which appellant says amounted to $468.47, and appellee

says amounted to $552.37, and gave appellee the right the sum of $300.00 in cash leaving the checks with a lady from whom appellant obtained the money.

The following Monday morning appellant redeemed the checks from the lady and upon the wife of appellee calling upon appellant for balance due appellee, he appellant informed her he had not obtained the cash on the checks and at her request, he, appellant turned over to her $245.12 in checks and $7.33 in cash. Appellant says with the understanding she was to return and pay him in cash the sum of $100.00. The wife of appellee denies this part of the conversation. Appellant insists that this judgment should be reversed:

First: Because the verdict is against the manifest weight of the evidence.

Second: The court erred in admitting improper evidence.

Third: The Court gave improper instruction for appellee.

The first objection one frequently urged as a ground for reversal must be considered from the facts appearing in each particular case. This case the attachment feature appears to have been abandoned by appellant upon the trial in the City Court as no evidence appears in record, so with that branch of the case out of the way it is only necessary to consider, did appellee owe appellant the $100.00, or was the evidence on this question such as to sustain a verdict of the jury that he did not.

Appellant, his son, and a witness by the name of Jacobs give in their own way evidence that tends to establish the claim of appellant and they are corroborated by the lady, Mrs. Zeiser, from who, appellant says he borrowed the $300.00 on Saturday night. The appellee says he turned over to appellant one hundred dollars more in checks than claimed by appellant

says amounted to $[illegible], and gave appellee that night the sum of $300.00 in cash leaving the checks with a lady from which appellant obtained the money.

The following Monday morning appellant redeemed the checks from the lady and upon the wife of appellee calling upon appellant for balance due appellee, he appellant informed her he had not obtained the cash on the checks and at her request, he, appellant turned over to her $[illegible] in checks and $[illegible] in cash. Appellant says with the understanding she was to return and pay him in cash the sum of $100.00. The wife of appellee denies this part of the conversation. Appellant insists that this judgment should be reversed:

First: Because the verdict is against the preponderant weight of the evidence.

Second: The court erred in admitting improper evidence.

Third: The Court gave improper instruction for appellee.

The first objection one frequently urged as a ground for reversal must be considered from the facts appearing in each particular case. This case the attachment feature appears to have been abandoned by appellant upon the trial in the City Court as no evidence appears in record, so with that branch of the case out of the way it is only necessary to consider, did appellee owe appellant the $100.00, or was the evidence on that question such as to sustain a verdict of the jury that he did not.

Appellant, his son, and a witness by the name of Jacobs give in their own way evidence that tends to establish the claim of appellant and they are corroborated by the lady, Mrs. Zeiser, from who, appellant says he borrowed the $300.00 on Saturday night. The appellee says he turned over to appellant one hundred dollars more in checks than claimed by appellant

and in this he is corroborated by his wife and witness Schmidt. It is not alone the number of witnesses the jury may consider in arriving at their verdict.

Where there is a contrariety of evidence it is more easy arriving at the truth from the little things in dispute that take place between the parties shown by the evidence, than can be done from determining from the statements of witnesses alone where one set of witnesses take the affirmative and the other the negative of the issue which is telling the truth. The undisputed circumstances in this case are sufficient to sustain the verdict. The only improper evidence complained of by appellant in the argument is evidence of appelle wherein he was asked: Do you owe Weinstein anything now? And the answer was : I don't owe one penny.

The objection is that it was the issue in the case and the answer called for a conclusion of the witness on the issue. While this is true it is proper for a party to a suit to deny and negative in as broad terms as plaintiff has made the charge. The appellant here said appellee owed him [illegible]. It was proper for defendant to deny that charge. The question and answer were proper in substance and the form could have done appellant no harm.

Two instructions were given for appellant upon the issue of attachment and issue of amount involved and ten instructions for appellee, six of which are objected to by appellant. The general objection made is that each of these instructions, i.e. 6,7,8,9, and 10 are misleading and improper.

These instructions when examined with the issues in the case are neither misleading or improper, except instruction four. This instruction calls upon the jury to determine what the material issues in the case are, and is an improper instruction,

and in this he is corroborated by his wife and other
witnesses. It is not alone the number of witnesses the jury
may consider in arriving at their verdict.

Where there is a contradiction of evidence so as to
arriving at the truth from the little things in dispute that
take place between the parties shown by the evidence, they
can be done from determining from the statements of witnesses
as alone where one not of witnesses take the affirmative
and the other the negative of the issue which is to follow
the truth. The undisputed circumstances in this case are
sufficient to sustain the verdict. The only thing jury without
complained of by appellant in the argument is evidence of
appelle wherein he was asked: Do you owe anything anything
now? And the answer was : I don't owe one penny.

The objection is that it was the issue in the case and
the answer called for a conclusion of the witness on the
issue. While this is true it is proper for a party, to a suit
to deny and negative in as broad terms as plaintiff has made
the charge. The appellant here said appellee owed him $20.00.
It was proper for defendant to deny that charge. The question
and answer were proper in substance and the form could have
done appellant no harm.

The instructions were given for appellant upon the issue
of attachment and issue of amount involved and ten instructions
for appellee, six of which are objected to by appellant. The
general objection made is that each of these instructions, 3,
6,7,8,9, and 10 are misleading and improper.

These instructions when examined with the issues in the
case are neither misleading or improper, except instruction
four. This instruction calls upon the jury to determine the
the material issues in the case are, and is an improper instruc-
tion,

and in some of the authorities has been held to be reversible error, but in other case error was not such error as in the opinion of the court affected the verdict.

We are of the opinion there was in this case nothing to obscure the issues. The issue was simple enough. The appellant having abandoned the attachment issue the only question for the jury to determine was, did the appellee owe appellant [illegible], or did he not owe him. The jury were instructed by other instructions on the issues involved. The rule as to reversal for the giving of improper instructions will be followed. Here it is apparent substantial justice has been done the judgment should not be reversed for slight errors in the instructions. (Dowd vs. Drainage Dist. 1, 160 App., 476).

The question in this case was one of fact and it is a well established rule that this court will not set aside a verdict on the ground the jury have reached a wrong conclusion as to the facts or a different conclusion than that entertained by the court unless the record shows that the verdict is against the clear preponderance of the evidence, this court is bound by it. (Hill vs. Bahrns 156 Ill., 314. Kellen vs. Kellen 260 Ill., [illegible])

We find no error in this record that goes to the merits of the case and the judgment will be affirmed.

Affirmed.

****

(Not to be reported in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th day of July, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court

OPINION

Fee $

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Kennedy

vs.

No. 48

March Term, 1914.

Chicago & Castorville Coal Co.

~~ERROR TO~~
APPEAL FROM

188 I.A. 355

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

Hon. W. M. Butler

Term No. 48. Agenda No. 3.

March Term, A. D. 1914.

James C. Kennedy, Administrator of the Estate of John S. Kennedy, deceased, Appellee, vs. Chicago & Carterville Coal Company, Appellant.	Appeal from the Circuit Court of ~~[illegible]~~ Williamson County.

188 I A. 355

Opinion by Harris, J.

This is an action in case brought by appellee to recover damages for the death of appellee's intestate in the sum of ten thousand dollars. Said death occurred on the 7th day of May, 1911, by slate and rock falling on deceased from the roof of the 7th north entry off of the fourth east entry in mine of appellant.

The original declaration consisted of seven counts, under direction of the court, the jury having found defendant not guilty under all the counts except the fourth, fifth and sixth, we find it unnecessary to give any of the other counts consideration.

The fourth count alleges that the defendant was operating a mine on May 7th, 1911, in which a large number of men including the deceased were employed; that on said date John S. Kennedy was in the employ of the defendant as a track layer; that there was a squeeze or low place in the roof of the 7th north entry off the 4th east entry in the mine which prevented the free passage of the electric motor car; that on said date the deceased was ordered by the defendant's foreman to leave his work as a track layer and go under said roof in the 7th north entry and with a pick and other tools to take down the coal, slate and

Term No. 48. Agenda No. 20.

March Term, A. D. 1914.

James C. Kennedy, Administrator of the Estate of John S. Kennedy, deceased, Appellee,	Appeal from the Circuit Court of Williamson County.
vs.	
Chicago & Carterville Coal Company, Appellant.	

Opinion by Harris, J.

This is an action in case brought by appellee to recover damages for the death of appellee's intestate in the sum of ten thousand dollars. Said death occurred on the 7th day of May, 1911, by slate and rock falling on deceased from the roof of the 7th north entry off of the fourth east entry in mine of appellant.

The original declaration consisted of seven counts, under direction of the court, the jury having found defendant not guilty under all the counts except the fourth, fifth and sixth, we find it unnecessary to give any of the other counts consideration.

The fourth count alleges that the defendant was operating a mine on May 7th, 1911, in which a large number of men including the deceased were employed; that on said date John S. Kennedy was in the employ of the defendant as a track layer; that there was a squeeze or low place in the roof of the 7th north entry off the 4th east entry in the mine which prevented the free passage of the electric motor car; that on said date the deceased was ordered by the defendant's foreman to leave his work on main track layer and go under said roof in the 7th north entry and with a pick and other tools to take down the coal, slate and

rock in the roof of said entry at said low place; that said roof was in a dangerous condition and was likely to fall when disturbed with picks or other tools in the manner of doing the work as herein stated; that defendant knew of such dangerous condition of the roof and of the dangerous manner of removing the same or by the exercise of reasonable care could have known thereof; that while deceased was in the exercise of reasonable care for his own safety and when he did not know of the dangers aforesaid, nor of the dangerous method of doing the work, and while he was attempting to take down the roof as ordered by the foreman said rock, slate and other material suddenly became detached and fell upon him.

The fifth count which alleges the same ownership and operation of the mine and the same employment therein of the deceased; that there was a low roof in the 7th north entry which defendant desired to take down in order to make more room between the track and the roof; that defendant's foreman in charge of the work negligently and carelessly ordered the deceased to take down said roof in a dangerous manner, that is to say, to go under the same and with pick and wedge and sledge take the same down; that the method of taking said roof down was known by the defendant to be dangerous or by the exercise of reasonable care could have been known to be dangerous; that the dangerous method of taking said roof down was not known to the deceased, and he did not have equal means of knowing of said danger with defendant; that in consequence of the dangerous method of taking said roof down it fell upon the deceased killing him, while in the exercise of due care for his safety.

The sixth count alleges the same ownership and operation of the mine and that there was a low place in the roof of the 7th north entry which defendant desired to take down in order to make

rock in the roof of said entry at said low place; that said roof was in a dangerous condition and was likely to fall when disturbed with picks or other tools in the manner of doing the work as herein stated; that defendant knew of such dangerous condition of the roof and of the dangerous manner of removing the same or by the exercise of reasonable care could have known thereof; that while deceased was in the exercise of reasonable care for his own safety and when he did not know of the dangers aforesaid, nor of the dangerous method of doing the work, and while he was attempting to take down the roof as ordered by the foreman said rock, slate and other material suddenly become detached and fell upon him.

The fifth count which alleges the same ownership and operation of the mine and the same employment therein of the deceased; that there was a low roof in the 7th north entry which defendant desired to take down in order to make more room between the track and the roof; that defendant's foreman in charge of the work negligently and carelessly ordered the deceased to take down said roof in a dangerous manner, that is to say, to go under the same and with pick and wedge and sledge take the same down; that the method of taking said roof down was known by the defendant to be dangerous or by the exercise of reasonable care could have been known to be dangerous; that the dangerous method of taking said roof down was not known to the deceased, and he did not have equal means of knowing of said danger with defendant; that in consequence of the dangerous method of taking said roof down it fell upon the deceased killing him, while in the exercise of due care for his safety.

The sixth count alleges the same ownership and operation of the mine and that there was a low place in the roof of the 7th north entry which defendant desired to take down in order to make

more room for its electric motor car to pass under; that the foreman in charge of said work negligently and carelessly ordered the deceased to take the coal, slate and rock down from the roof in said entry in a dangerous manner, that is to say, to go under said roof and begin with picks at the edges or margins of said sag or low place and take said roof down and come facing each other until the said workmen should meet in the center or middle of said low place; that the method of taking said roof down as aforesaid was known by defendant to be dangerous or by the exercise of reasonable care could have been known to be dangerous; that the deceased did not know that the method employed by the defendant was dangerous nor did he have equal means with the defendant of knowing thereof; that while deceased was taking said roof down in the exercise of due care for his own safety, it fell upon him killing him instantly.

To this declaration the defendant filed the general issue. The jury returned a verdict in favor of the plaintiff assessing his damages at Three Thousand Dollars. A motion for new trial was made and overruled and judgment was entered on the verdict.

This case has been tried twice and submitted to two juries upon the three counts mentioned, the jury upon each trial returning a verdict in favor of appellee for the same amount $3000.

This being the second appeal to appellate court by appellant the former opinion of this court appearing in Volume 180 Ill. App., 42, and the statement of fact in that opinion is here adopted as follows: "On May 7, 1911, John Kennedy was killed in the defendant's mine by the falling of coal and slate from the roof of the entry which he was engaged at the time in taking down. There was a low place in the roadway in the seventh north entry off the fourth east entry in defendant's mine, which place was wet and

more room for its electric motor car to pass under; that the foreman in charge of said work negligently and carelessly ordered the deceased to take the coal, slate and rock down from the roof in said entry in a dangerous manner, that is to say, to go under said roof and begin with picks at the edges or sides of said sag or low place and take said roof down and come facing each other until the said workmen should meet in the center or middle of said low place; that the method of taking said roof down as aforesaid was known by defendant to be dangerous or by the exercise of reasonable care could have been known to be dangerous; that the deceased did not know that the method employed by the defendant was dangerous nor did he have equal means with the defendant of knowing thereof; that while deceased was taking said roof down in the exercise of due care for his own safety, it fell upon him killing him instantly.

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muddy and interferred to some extent with the operation of the motor used in hauling coal. On Saturday, May 6th, John Kennedy had been at work in this entry at this low place and as Flynn, the mine manager, passed through there Kennedy said to him, "I can't get this road in shape like it ought to be; this need must to be cleaned up and this road filled up with ashes." And Flynn said to him, "Will you want to work tomorrow on it," and Kennedy said, "Yes;" and Flynn then said, "How many men do you want," and Kennedy said, "A couple besides myself," and Flynn said, "All right," and he then had the ashes taken in there and sent Morris and Proudlock with Kennedy. On the next day they began the work and Corcoran, the assistant mine manager, also came to assist them in this work. After raising the track it became necessary to take down a part of the roof so as to allow the motor to pass through without dragging off the coal and so Mr. Long was called in to assist in this work. There was about ten or twelve inches of coal which extended to a feather edge on the face of the slate roof. When they were ready to remove the coal Corcoran, the assistant mine manager, as stated by one of plaintiff's witnesses, examined the roof and found a rotten or soft place in the roof and at that time said it did not look like it was going to get good but afterwards he took down this soft place and then said it was all right to go ahead and after this soft place was taken down the witness says the roof seemed solid and he went to cutting on one side of the entry and Corcoran on the other. He says Corcoran showed them how to do the work by cutting the pole on the side and wedging it down; that from time to time during the progress of the work they sounded the roof and pronounced it solid. The mine manager had measured off the part of this roof that was to be taken down, which he

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about thirty feet. Two of the men worked from the east end and two from the west end, working towards each other. About half an hour before the accident Corcoran left the place and the others remained at the work and about five minutes before the accident there was a pop in the roof and the men jumped back and Kennedy then sounded the roof and said it was solid and they proceeded with the work, as before, and had completed the whole of it except about four feet when the fall occurred. There was several tons of the coal and slate fell and caught Kennedy and crushed him to death. Kennedy had been at work for the appellant for about two years and, as appears from the evidence, was a miner of many years' experience; had been a mine foreman in some mine in Oklahoma for about five years, and that he had dug coal in Ohio and Alabama, had acted in the capacity of assistant mine manager for the defendant for four or five years, had papers in this state as a mine examiner and was a practical coal miner and competent to perform the duties of assistant mine manager, and to take down top coal and timber entry ways. That during the time he had worked for defendant his general business was track layer but during this time he also acted as assistant mine manager for four or five weeks; that he had been engaged in opening up place where there was gas to contend with, to create a place for an over cast and had been called upon to do and perform any kind of work in the mine, was regarded by the mine manager as competent to perform any kind of dangerous work and had from time to time performed for the defendant work of this character."

There are numerous errors assigned why this case should be reversed. It would serve no good purpose to extend this opinion into a discussion of more than the one: "That the verdict and judgment is against the manifest weight of the evidence."

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There are numerous errors assigned why this case should be reversed. It would serve no good purpose to extend this opinion into a discussion of more than the one: "That the verdict and judgment is against the manifest weight of the evidence."

That the evidence as it appears from the record is the same as presented to this court on the former appeal, except appellee produced two additional witnesses Thomas Clayton and David Lane. The evidence of these two witnesses does not add anything to the issues in this case and as some of the contentions of appellant were the same on the former appeal we adopt the following language of the former opinion:

"It is contended by Counsel for appellant that before there can be a recovery in a case of this kind the burden is upon the plaintiff to prove by a preponderance of the evidence that the place, appliances method or thing charged as being defective, is defective, as alleged; that the defendant knew thereof or could have known thereof by the exercise of reasonable care; that the deceased did not know thereof and did not have equal means with the defendant of knowing thereof, and the deceased himself was, with reference to the injury, exercising reasonable care for his own safety. It is true as contended by counsel for appellee that it is the duty of the master to use reasonable care to provide servants with a reasonable safe place in which to work is a positive obligation, and he is liable for the negligent perfomance of such duties whether he undertakes its performance personally or through another. (Himrod Coal Co. v. Clark, 197 Ill., 514.) It is charged by this declaration that the deceased was placed in a dangerous place to work which was known to the defendant or by the exercise of reasonable care could have been known to it, and that deceased did not know of its dangers and did not have equal means with the defendant of knowing it. It is true, as appears from the evidence, that in the prosecution of the work, a clod fell and killed John Kennedy, but what was the apparent condition prior to the fall and during

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the time the men were engaged at work in taking down this coal. The evidence is overwhelming that prior to the accident the men there engaged at work did from time to time sound the roof and that it appeared to be solid. The only time that any fall in the roof was shown to exist was prior to the commencement of the work, when Corcoran, the assistant mine manager , sounded the roof and found a soft place which he removed and after this soft place was removed the same witness then says the roof became solid and continued so up to the time of the fall, and some of the witnesses say that the fall was occasioned by a fault in the slate which could not be seen by any one.

It is contended that there was a squeeze on in the mine, near this entry, which made it dangerous. We have examined this record carefully and practically all of the witnesses say that the squeeze did not extend to this place; that a squeeze is evidenced by the bulging up of the bottom, or the pressure upon the pillars, causing them to chip off and that no such evidences were present; and they further say that some of the coal remained upon this roof. One witness testified that he thought the squeeze extended to this entry but on cross examination he did not know whether there was much of an upheaval of the bottom or crushing of the pillars or not, he did not examine it. The other witnesses did examine it and say that no such thing occurred. Practically all of the witnesses for appellee and appellant who had any knowledge upon this subject say that from the time of the removal of the soft spot above referred to by Corcoran, that the roof continued solid. It seems to us from this evidence that any reasonable person would have been justified in concluding that the place in which the men were engaged at work, and their manner of performing it was reasonably safe.

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We believe that it appears from this evidence that the defendant's representatives and the deceased both believed the place at which they were engaged at work to be reasonably safe, and that it is not made to appear that there was any reason why the representatives of the defendants could have believed otherwise. They, as well as others that worked with them and the deceased, applied the usual test for determining its safety, and we think sincerely came to the conclusion that it was safe to work under. We think that John Kennedy was a man of experience and that he had as much opportunity to know the conditions as to whether they were reasonably safe or not as the defendant's managers. It in fact appears from the record that about thirty minutes before the fall came the defendant's manager had gone to some other part of the mine and that in the meantime there was a pop in the roof which caused the men to jump back, and John Kennedy then tested the roof and proceeded with the work. It certainly looks as if his opportunities were as good as any one to know the real conditions of that roof; and if this be true then under the doctrine laid down by our supreme court it is not only necessary to prove that the place was defective but the plaintiff must also prove that he did not know of the defect and had not equal means of knowing with the master. (Montgomery Coal Co. v. Barringer, 218 Ill.,327; Goldie v. Werner,151 Ill., 551.) One of the witnesses who helped to remove the fall state the injury says the slate was hard, that they had to take a sledge to break it up and this confirms the statement of other witnesses that it appeared solid in the roof, and that the fall probably came from the fault in the slate which was concealed from every one.

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deceased was taken from his usual work and was at this time engaged at work under a specific order given by the defendant. Each count of the declaration alleges that the deceased was taken from his usual work; charges that the defendant knew of such dangerous condition or could have known thereof by the exercise of reasonable care, and that the plaintiff's intestate did not know the dangers and did not have equal means with the defendant of knowing thereof, which, as we understand the law, it was necessary for the plaintiff to allege to entitle him to recover. Wiggins Ferry Co. v. Hill, 112 Ill., App. 475. As we have before observed, the appellee has failed to prove some of the material averments above set forth but aside from this we do not believe that the principle invoked by him is applicable to the facts in this case. The deceased was shown by the evidence to be a capable man, one of many years experience in mining, having had several years' experience as mine foreman, was experienced in taking down and removing coal and slate from the roof of a mine, had been engaged in track laying and had in fact, in this mine, pursued to some extent each one of these particular occupations and was reliedupon and used as a man for that purpose on account of his skill to care for and repair dangerous places in a mine. The mere fact that he had, on the day previous, been engaged in the particular business of track laying and was taken from that work and placed at a work that he understood, had heretofore performed and was experienced in and knew about, would not bring him within the rule of having been transferred from his regular business to a work to which he had no acquaintance. It is the fact of the servant being placed at a work with which he had no acquaintance, concerning which he is not informed, that the burden is cast upon the master to see that

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he is not exposed to dangers unknown to him. We think the facts are that the deceased was as well acquainted with the work in which he was engaged as the assistant mine manager or any other person employed in this work at that time. It was necessary for the plaintiff to allege and prove that the order was negligently given and to make it a negligent order it was necessary to prove that the place to which the servant was sent to perform the work or the manner of its performance was not reasonably safe and that the Master knew it or could have known it. It is said in the case of Swiercz vs. Illinois Steel Co., 231 Ill., 460: 'The issue on trial was the negligence of the defendant . It was essential to the plaintiff's case that the order should have been negligently given. It was necessary to prove that the defendant knew, or by the exercise of reasonable care might have known, of the danger."

The evidence in this case having been twice examined by this court we again reach the conclusion that the verdict of the jury is against the manifest weight of the evidence. That the deceased's knowledge of conditions and the dangers was equal to if not superior to that of appellant, if so his representative could not recover. That the place at the time of the accident was reasonably safe, if so he could not recover. That the order was given, was a general order and not a direct specific order to do work in a particular manner, and if a general order it did not relieve deceased of the assumption of risk. (Nuthen vs. Jeffrey, 259 Ill., 378.) The deceased assumed the risk incurred by obedience to a negligent order of the master when the danger was to him as apparent open and understood as it is to the master who gives the order. (Swiercz vs. Ill. Steel Co., 231 Ill., 456.)

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It is not pretendedthat there was any danger latent or apparent for either master or servant at or near this place, except the evidence that some years prior thereto there had been squeeze all trace of which and dnager therefrom had been removed long prior to time of accident. It is not claimed that deceased did not have the knowledge, experience and ability to know and did know all that a reasonably prudent man could know of the safety of the place. This being the condition of this record it would certainly not be in accord with justice to permit a verdict and judgment entered upon this state of facts to stand; notwithstanding, the argument of appellee that because twenty-four men have passed upon the same state of facts and reached the same conclusion by setting their finding aside the jury system becomes a failure.

We will treat this as an appeal to give the verdict of juries and judgments of the trial courts the consideration and presumptions they are entitled to under the law, because counsel for appellee would not want any other construction put upon it.

The duty and responsibility now imposed upon this court is that notwithstanding there is evidence in the record tending to support the verdicts in favor of appellee, yet it is the duty of this court to review questions of fact and to reverse a judgment based upon the verdict of the jury when upon a consideration of the evidence, it finds such verdict clearly against the manifest weight of the evidence. This has been the law so long that it is undisputed. (I.C.R.R.Co. vs. Hecker,109 App.375. Harvey vs. McGuirk, 168 App., 390.)

The facts in this case will never appear different, another trial would serve no good purpose, labor and expense to the parties and counsel with the same result. When these are the facts

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The facts in this case will never appear different, another trial would serve no good purpose, labor and expense to the parties and counsel with the same result. When these are the facts

and the condition of this record the duty of this court as was said in the case of the Illinois Steel Co. vs. Kennall, 93 App. 83, "If the finding of the jury be without any support whatever, or if it be contrary to the manifest weight of the evidence, in either case the duty of this court is to so declare and to set aside a judgment based upon such a finding." Citing many cases where the Supreme Court so held when it reviewed questions of facts.

A second verdict based upon substantially the same evidence will be set aside as against the evidence and a final judgment rendered in favor of adverse party where the evidence does not support the judgment of the lower court. (Harver vs. McGuirk, 168 App., 39.)

The mere fact that a jury have passed upon questions of fact can not absolve this court from determining whether or not the verdict is justified by the evidence. (I.C.R.R.Co. vs. Cunningham, 102 App., 206.)

The judgment will therefore be reversed.

-------- Reversed.

Finding of fact to be incorporated in the record: We find, First: That appellee's intestate was not at the time of the accident acting under a negligent order of appellant.

Second: That the conditions of safe or unsafe place to work at the place where accident happened were as well known to appellee's intestate as to appellant.

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(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

377

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 25th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Frichett
adm

vs.

No. 58

March Term, 1914.

I C R R Co.

~~ERROR TO~~
APPEAL FROM

188 I.A. 377

Circuit COURT

Pulaski COUNTY

TRIAL JUDGE

Hon. M. M. Butler

Term No. 58. Agenda No. 51.

March Term, A. D. 1914.

Clay Frechett, Administrator of the Estate of Lewis W. Johnston, deceased, Appellee, vs. Illinois Central Railroad Company, Appellant.	Appeal from the Circuit Court of Pulaski County.

188 I.A. 377

Opinion by Harris, J.

This is a suit brought by appellee against appellant for wrongfully causing the death of Lewis W. Johnston.

The declaration filed and upon which the trial was had consisted of five counts, the formal parts of each count being ~~xxx~~ practically the same and alleging: That on the 25th day of January, 1913, in the life time of Lewis W. Johnston appellant was the owner, operating and using a certain railroad extending through county aforesaid and through the village of Ullin, a densely populated portion of said county, and being such owner, appellant then and there drove a certain locomotive engine and train of cars thereto attached up to, upon and across a travelled way in said village and appellee's intestate was travelling along and upon said travelled way from his place of business on the east side of said village to his place of residence on the west ~~side~~ side, exercising due care for his own safety, the appellant by its servants run said train at a high and dangerous rate of speed, ~~x~~ 45 miles per hour through said village, no bell or whistle being sounded on said locomotive, and no head-light burning although it was dark, and that appellee's intestate was struck and instantly killed. That Lewis W. Johnston left surviving ~~xx~~ a widow, son, two daughters and a grand-daughter as

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This is a suit brought by appellee against appellant for wrongfully causing the death of Lewis W. Johnston.

The declaration filed and upon which the trial was had consisted of five counts, the formal parts of each count being practically the same and alleging: That on the 25th day of January, 1913, in the life time of Lewis W. Johnston appellant was the owner, operating and using a certain railroad extending through county aforesaid and through the village of Dilin, a densely populated portion of said county, and being such owner, appellant then and there drove a certain locomotive engine and train of cars thereto attached up to, upon and across a travelled way in said village and appellee's intestate was travelling along and upon said travelled way from his place of business on the east side of said village to his place of residence on the west side, exercising due care for his own safety, the appellant by its servants run said train at a high and dangerous rate of speed, to-wit 45 miles per hour through said village, no bell or warning sounded on said locomotive, and no head-light shown though it was dark, and that appellee's intestate was instantly killed. That Lewis W. Johnston left surviving him his widow, son, two daughters and a grand-daughter as

his heirs at law and next of kin, who are still living and have been deprived of their means of support and education to the damage of appellee as administrator of $10,000.00. In the consideration of this case it will become necessary to refer to the different counts of this declaration, and they are distinguished as follows:

First count simply charges negligence in the handling of train run at excessive rate of speed, without bell or whistle being sounded and without a head light and it dark.

Second count and the count under which appellant was found guilty charges that the railroad of appellant crossed a certain traveled way in said village used by the public as a crossing for pedestrians at a point a short distance north of passenger station at Ullin and had been so used for 15 years, and as deceased was traveling as heretofore mentioned appellant by its servants as heretofore mentioned drove a certain train toward the traveled way and while deceased was rightfully traveling upon said traveled way appellant wilfully, wantonly and negligently drove and managed said train in that the locomotive was without a headlight although dark and was run at a reckless and dangerous speed in Ullin, to-wit: 45 miles per hour, and no bell or whistle sounded and that by and through the carelessness, wantonness and wilful negligence Johnston was killed.

Third count charges the traveled way was used by the public by and with the consent, acquiescence and invitation of appellant in other respects similar to first count.

The fourth count charges a public highway to be at place where Johnston was killed and negligent operation as in first count.

The fifth count also charges a public highway and failure to

his heirs at law and next of kin, who are still living and have been deprived of their means of support and education to k the damage of appellee as administrator of $10,000.00. In the consideration of this case it will become necessary to refer to the different counts of this declaration, and they are distinguished as follows:

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Second count and the count under which appellant was found guilty charges that the railroad of appellant crossed a certain traveled way in said village used by the public as a crossing for pedestrians at a point a short distance north of passenger station at Gilin and had been so used for 15 years, and as deceased was traveling as heretofore mentioned approaching by its servants as heretofore mentioned drove a certain train toward the traveled way and while deceased was rightfully traveling upon said traveled way appellant wilfully, wantonly and negligently drove and managed said train in that the locomotive was without a headlight although dark and was run at a reckless and dangerous speed in Gilin, to-wit: 45 miles per hour, and no bell or whistle sounded and that by through the carelessness, wantonness and wilful negligence Johnston was killed.

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The fourth count charges a public highway to be at place where Johnston was killed and negligent operation as in first count.

The fifth count also charges a public highway and failure to

give statutory signals. Appellant to this declaration filed the plea of not guilty and upon trial of the issues so joined by a jury a verdict was returned finding appellant guilty as charged in second count of the declaration and fixing appellee's damages at sum of $8000.00. Motion for new trial overruled. Judgment entered and this appeal.

The facts in this case practically undisputed are that on the 25th day of January, 1913, appellant's railroad extended through the village of Ullin, a town of from 900 to 1000 population from the north to the south and about the center of the village north and south was appellant's depot on the east side of the tracks fronting west towards its tracks, the track next to depot known as north bound track, second track from depot south bound track, third track from depot passing track, and fourth track from depot house track. There is no street across right of way east and west nearer than 250 feet south of depot and another street 250 feet south of this one.

That immediately west of house track and extending south past the northwest corner of depot is a cattle pen; on the right of way of appellant immediately north of cattle pens and about 25 feet north of depot is a cinder walk from street running north and south; on west side of right of way and extending east on right of way to west side of passing track. The cinders to build this walk were furnished by appellant and constructed under direction of city authorities several years ago and used since by pedestrians. Immediately north of this cinder walk is a coal shed, the walk or traveled way as described in declaration is between the coal shed and cattle pen on right of way of appellant. There was no filling in between rails of pass-

give statutory signals. Appellant to this declaration filed the plea of not guilty and upon trial of the issues so joined by a jury a verdict was returned finding appellant guilty as charged in second count of the declaration and fixing appellee's damages at sum of $8000.00. Motion for new trial overruled. Judgment entered and this appeal.

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That immediately west of house track and extending south past the northwest corner of depot is a cattle pen; on the right of way of appellant immediately north of cattle pens and about 25 feet north of depot is a cinder walk from street running north and south; on west side of right of way and extending east on right of way to west side of passing track. The cinders to build this walk were furnished by appellant and constructed under direction of city authorities several years ago and maintained by pedestrians. Immediately north of this cinder walk is a coal shed, the walk or traveled way as described in declaration is between the coal shed and cattle pen on right of way of appellant. There was no filling in between rails of main-

ing track, switch or south bound track, between south bound and north bound tracks extending north from depot to opposite this cinder path, appellant had constructed a board platform.

The passing track was used for storing cars and this cinder path was frequently blocked with such cars. It was at times opened up by appellant at request of authorities. There were cars standing upon it at the time of the accident and for an opening at that time a person crossing would travel about two car's length south.

Three freight trains going south passed through Ullin on the morning in question between five and seven o'clock, the first two through freight the first at about 6:20 and the second 6:30, and the third a train handling dead freight 6:45, and a train going north at 6:30.

The deceased Johnston on the morning in question, a man 60 years of age, living about 250 feet northwest from depot at about 5:30 left his residence with lantern to go to his place of business on the east side of the track to make fires and get up steam. His usual way was across right of way over cinder path and by depot. That aside from the loss of an eye he was a strong healthy man for his years and had as members of his family at the time a widow, one son, one daughter, unmarried, and one daughter married, wife of appellee, and one grand child. His business was operating a hoop factory from which business he had an income of about $1,000.00 per year.

It is the contention of appellee that deceased was killed by the first freight train going south that morning in charge of engineer Briggs. The witnesses differ as to the time this train went through and the time Johnston was found lying on the west side of the south bound track from eight to twenty-five

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The deceased Johnston on the morning in question, a man 60 years of age, living about 750 feet northwest from depot at about 5:30 left his residence with lantern to go to his place of business on the east side of the track to make fires and get up steam. His usual way was across right of way over cinder path and by depot. That side from the loss of an eye he was a strong healthy man for his years and had as members of his family at the time a widow, one son, one daughter, unmarried, and one daughter married, wife of appellee, and one grand child. His business was operating a hoop factory from which business he had an income of about $1,000.00 per year.

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feet south of cinder path. S ome of the witnesses make it as early as 5:30 and some as late as 6:30 A. M. The important controverted question of fact being the time and the train that hit him. The evidence tending to prove negligence in the operation of these trains is as to the first train passing through Ullin as testified to by train dispatcher at 6:20. The verdict in this case is based upon the second count of the declaration and the jury in effect have by the same verdict found appellant not guilty under the other counts of the declaration. (A ull vsl Swift & C o., 155 App., 638).

The complaint that the second count has not a valid ground for recovery can not be raised at this time if the evidence meets the averments of that count of the declaration as the count after verdict is good although it may state a good cause of action in a defective way.

It is urged by appellant it was error to admit evidence of the construction and use of this cinder path, and the case of Neice vs. C. & A. R. R. Co., 254 Ill., 595, is cited as an authority. The evidence in that case admitted was of entirely different character, it was what the public did in violation of the notice of the company and of their own accord. In the case before this court evidence was offered as to the locality, streets, and cross streets, location of depot and acts of the company in the building of cinder walk tending to prove that the travel of this way was by the company's invitation, which if established by preponderance of the evidence would entitle the deceased to treatment by the company of a person rightfully on this path and under the authority cited from a consideration of this record that evidence was properly admitted.

It is next urged that Johnston was rightfully upon the

feet south of cinder path. One of the witnesses said it was early as 5:30 and some as late as 6:30 A. M. The important controverted question of fact being the time and the train that hit him. The evidence tending to prove negligence in the operation of these trains is as to the first train passing through Gilin as testified to by train dispatcher at 6:20. The verdict in this case is based upon the second count of the declaration and the jury in effect have by the same verdict found appellant not guilty under the other counts of the declaration. (A ull vel swift & C o., 135 App., 638).

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It is next urged that Johnson was rightfully upon the

tracks which was not proven. There was evidence and admitted facts which tended to prove he was rightfully on the tracks or qualifying this statement somewhat where the company might reasonably expect persons to be.

The contention of appellant therefore that the peremptory instruction presented at the close of appellee's evidence and again at the close of all the evidence should have been given fails. It is not necessary to prove either wanton or wilful negligence, that appellee must prove that appellant through its servants had specific knowledge of an individual on the track or platform or specific ill will toward or an intention to injure an individual, where the servants of the company were running its engine in the dark without a head light or a bell ringing at a high and dangerous rate of speed. While it is true that upon the right of way of the railroad where the public are not invited or authorized to go for the transaction of business with the railroad company those in charge of the train must have knowledge both of the presence of the trespasser and of his dangerous situation, but where depot grounds and platforms, loading shoots, coal sheds provided by the railroad company for the use of the public in the transaction of business where persons have a right to be for legitimate purposes and where they may reasonably be expected, are quite different, and in this case there was sufficient evidence to make the question raised of wanton and wilful negligence a question of fact and the court did not err in submitting the issue to the jury.

The case at bar belongs to that class of cases called a close case upon the facts because the appellee relieas upon the negligence in handling of the first of the three trains to recover so that the time of the injury and the passing of this

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The case at bar belongs to that class of cases called close case upon the facts because the appellee relies upon the negligence in handling of the first of the three trains to recover so that the time of the injury and the passing of this

train, there being no eye witnesses, become all important. We have the testimony of witnesses varying one hour to one and one-half hours upon both propositions. The further fact of the age of deceased with the evidence of his earning capacity would give to this verdict the appearance of being excessive, so that whatever errors may appear must be scrutinized the more closely and held as going to the merits of the case.

Appellant complains of the giving of two instructions for appellee: The ninth reads as follows:

"You are instructed that if you believe from a preponderance of the evidence in this case that the defendant carelessly and negligently operated and managed the train in question in manner and form as charged in the declaration, and that such negligence amounted to wanton and wilful negligence as defined in these instructions, and that as a direct result of such wanton and willful negligence the plaintiff's intestate Lewis W. Johnston was struck and killed by said train, then your verdict should be for the plaintiff."

But one count in the declaration either by way of facts or as a conclusion charged negligence wanton and wilful and under this instruction the court gave the jury the right to take the charge of negligence under any of the other counts if in the opinion of the jury the charge came under the definition of wanton and wilful negligence and find defendant guilty. The jury should have been limited in finding defendant guilty of such negligence to second count. This instruction does not pretend to state the facts that constitute wanton and wilful negligence and cannot be justified on that ground. The defini-

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tion of wanton and wilful negligence in appellee's sixth and seventh given instructions does not assist the jury in distinguishing the facts under these different counts of declaration. This is a matter of which appellant could not complain and if this error stood alone would not be reversible error. Complaint is made by appellant of the giving of appellee's eleventh and last instruction.

"If you find the defendant guilty as charged from the evidence then upon the question of damages the court instructs you that the plaintiff is not required to testify or produce witnesses who have testified to any specific damage as represented by dollars and cents; nor is the plaintiff required to furnish, in the proofs, any definite or specific basis for the computation of said damages, but that such question is for the jury to determine as practical men according to the evidence and all the facts and circumstances proven in the case."

Under the statute authorizing a jury to fix damages in case they found appellant guilty there could be no defense as to the language used in the latter part of the instruction, because the statute says, you are authorized to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin. The statute is the jury's limitation and the basis for computation. With this instruction the doors are opened to a consideration of all facts in evidence not only of pecuniary loss but of the evidence of negligence and the horrors of the killing. This instruction has to be condemned and criticized. (I. C. R. R. Co. vs. Johnson, 221 Ill., 4[illegible]. Duren Coal & Ice Co. vs. Howell, 204 Ill., 515. Date vs. Gus Blair

tion of wanton and willful negligence in appellee's sixth and seventh given instructions does not assist the jury in distinguishing the facts under these different counts of declaration. This is a matter of which appellant could not complain and if this error stood alone would not be reversible error. Complaint is made by appellant of the giving of appellee's eleventh and last instruction.

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Coal Co., 158 App., 578.)

The appellee recognizes the force of the criticism of these authorities and replys by saying when instruction number eleven is considered with appellee's number ten as neither instruction calls for a finding harmless error at least was committed, and the case of Carney vs. Marquette Coal Co., 260 Ill., 226, is cited as an authority in support of this contention. Neither of the instructions complained of are set out in the opinion in that case. The court was of the opinion after an examination of the record that there was no reversible error. As to whether the question of damages being excessive was questioned does not appear. It appeared from the opinion to be a question of the defendant being liable. In this case from an examination of instruction ten, if the giving of eleven is error, ten lays down another correct and different rule for the jury in assessing damages, not as an aid in considering eleven, but contradictory thereof. Which rule so laid down did the jury follow, one was as open and broad as the other, one as much the law binding upon them as the other, and the damages allowed by them would indicate they had followed the most liberal one of the two(eleven). This said by appellee no finding was called for under eleven and that it does not pretend to direct a verdict. It does call upon them to determine the amount of damages. The court will assume that all other questions to be determined by the jury to make appellant responsible for damages had been determined by the jury before they were ready to consider this instruction and that does not put this instruction beyond criticism.

The question of the first fast freight being the train that caused the injury in this case being the close question to be determined, coupled with the fact that the verdict is large in amount, are considered by the court in holding that the above errors go to the merits of the case.

Therefore for the reasons given the judgment will be reversed and cause remanded.

Reversed and Remanded.

(Not to be reported in full.)

Coal Co., 188 App., 378.)

The appellee recognizes the force of the criticism of these authorities and replies by saying when instruction number eleven is considered with appellee's number ten as neither instruction calls for a finding harmless error at least was committed, and the case of Carney v. Marquette Coal Co., 260 Ill., 326, is cited as an authority in support of this contention. Neither of the instructions complained of are set out in the opinion in that case. The court was of the opinion after an examination of the record that there was no reversible error. As to whether the question of damages being excessive was questioned does not appear. It appeared from the opinion to be a question of the defendant being liable. In this case from an examination of instruction ten, if the giving of eleven is error, ten lays down another correct and different rule for the jury in assessing damages, not as an aid in considering eleven, but contradictory thereof. Which rule so laid down did the jury follow, one was as open and broad as the other, one as much the law binding upon them as the other, and the damages allowed by them would indicate they had followed the most liberal one of the two(eleven). It does not pretend to direct a verdict. It does call upon them to determine the amount of damages. The court will assume that all other questions to be determined by the jury to make appellant responsible for damages had been determined by the jury before they were ready to consider this instruction and that does not put this instruction beyond criticism.

The question of the first fact freight being the train that caused the injury in this case being the close question to be determined, coupled with the fact that the verdict is large in amount, are considered by the court in holding that the more errors go to the merits of the case.

Therefore for the reasons given the judgment will be reversed and cause remanded.

Reversed and Remanded.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th day of July, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

188 p 397

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

The F. W. Cook Brewg Co.

vs.

No. 12

March Term, 1914.

Taccaro et al

~~ERROR TO~~
APPEAL FROM

188 I.A. 397

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

Hon. W. W. Clement

Term No. 12. Agenda No. 50.

March Term, A. D. 1914.

No. 272

F. W. Cook Brewing Company, Appellant,

vs.

Mike Vaccaro, Appellee.

Appeal from the Circuit Court of Williamson County.

No. 273.

F. W. Cook Brewing Company, Appellant,

vs.

Domeneco Rodasta and Antonio Vaccaro, Appellees.

Appeal from the Circuit Court of Williamson County.

McBride, J.

The above entitled causes were consolidated and tried by the court without a jury, by consent, and at the conclusion of the trial the Circuit Judge rendered judgment against the plaintiff for costs. The plaintiff appeals and the two cases are by agreement abstracted, argued and tried in this court together. In the abstract the former case is denominated as case No. 272, and the latter case as No. 273. The two cases grow out of an order based upon the same contract.

In No. 272, Mike Vaccaro is sued as principal and in No. 273 the appellees are sued as sureties upon the Mike Vaccaro contract. On the7th day of May 1909, Mike Vaccaro at Johnston City, Illinois, executed and forwarded to the appellant at Evansville, Indiana, the following agreement, the execution of which was completed on May 9, 1909, at Evansville, Indiana, by the appellant approving and signing the contract:

"This agreement made and entered into this 7th day of May, 1909, by and between the F. W. Cook Brewing Company of Evans-

Term No. 12. Agenda No. 50.

March Term, A. D. 1914.

No. 272	
F. W. Cook Brewing Company, Appellant	Appeal from the Circuit Court of Williamson County.
vs.	
Mike Vaccaro, Appellee.	

No. 273.	
F. W. Cook Brewing Company, Appellant,	Appeal from the Circuit Court of Williamson County.
vs.	
Domenico Rodeata and Antonio Vaccaro, Appellees.	

McBride, J.

The above entitled causes were consolidated and tried by the court without a jury, by consent, and at the conclusion of the trial the circuit judge rendered judgment against the plaintiff for costs. The plaintiff appeals and the two cases are on agreement abstracted, argued and tried in this court together. In the abstract the former case is designated as case No. 272, and the latter case as No. 273. The two cases grew out of an order based upon the same contract.

In No. 272, Mike Vaccaro is sued as principal and in No. 273 the appellees are sued as sureties upon the Mike Vaccaro contract. On the 7th day of May 1909, Mike Vaccaro at Johnson City, Illinois, executed and forwarded to the appellant at Evansville, Indiana, the following agreement, the execution of which was completed on May 9, 1909, at Evansville, Indiana, by the appellant approving and signing the contract:

"This agreement made and entered into this 7th day of May, 1909, by and between the F. W. Cook Brewing Company of Evans-

ville, Indiana, and Mike Vaccaro, witnesseth. That the said Brewing Company hereby agrees to give the said Mike Vaccaro the exclusive privileges of selling its draught and bottle beers at wholesale in said town of Johnston City, Illinois, and hereby to sell and deliver to him its beers F. O. B. cars at Johnston City, Illinois, in car load lots at the following prices .....
..... And the said Brewing Company agrees to pay all freight on empty cooperage cases and boxes returned to it by the said Mike Vaccaro, and furnish ample ice for preservation of the draught beer in transit, and make allowances and give credit for all bottle beer cases and bottles returned to it.
.....

It is understood that the said Brewing Company shall not be expected to make any payments or allowances not herein specified. And the said Mike Vaccaro agrees to make settlements and payments whenever demanded by the said Brewing Company, or its representatives; take good care of all property of the said Brewing Company intrusted in his care, give special attention to gathering up and returning of all empty cooperage and during the continuance of this agreement he will neither sell nor be direct or indirectly interested in the sale of any beer other than that of the said Brewing Company.

This agreement shall not be binding upon said Brewing Company until the same has been approved by its President, Vice President or Secretary and Treasurer, and its corporate seal affixed at Evansville Indiana. This agreement may be terminated by either party upon ten days notice by either party in writing."

Upon the back of the foregoing instrument there may be-

ville, Indiana, and Mike Vaccaro, witnesseth: That the said Brewing Company hereby agrees to give the said Mike Vaccaro the exclusive privilege of selling its draught and bottle beers at wholesale in said town of Johnson City, Illinois, and agrees to sell and deliver to him its beers F. O. B. cars at Johnson City, Illinois, in car load lots at the following prices .....

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It is understood that the said Brewing Company shall not be expected to make any payments or allowances not herein specified. And the said Mike Vaccaro agrees to make settlements and payments whenever demanded by the said Brewing Company, or its representatives; take good care of all property of the said Brewing Company intrusted to his care, give special attention to gathering up and returning of all empty cooperage and during the continuance of this agreement he will neither said or be direct or indirectly interested in the sale of any beer other than that of the said Brewing Company.

This agreement shall not be binding upon said Brewing Company until the same has been approved by its President, Vice President or Secretary and Treasurer, and its corporate seal affixed at Evansville Indiana. This agreement may be terminated by either party upon ten days notice by either party in writing."

Upon the back of the foregoing instrument there can be-

dorsed an agreement by Domeneco Rodasta and Antonio Vaccaro to stand as sureties, "In a sum not to exceed one thousand dollars for the faithful performance by the said Mike Vaccaro of all of the agreements and conditions contained in said agreement, hereby guaranteeing that the said Mike Vaccaro will pay said Brewing Company all sums which shall become due from him to it for beer sold to him, including cases, andbottles, as well as for saloon fixtures and other merchandise. This shall remain and continue surety for the faithful performance by said Mike Vaccaro of the conditions and agreements above referred to, and the failure of the said Brewing Company to notify the sureties of any violations of the said agreement by the said Mike Vaccaro shall not release said sureties from liability for subsequent violations. Dated May 7, 1909".

It is stipulated by the parties herein that as a result of an election under the local option statute of the State of Illinois, Johnston City became dry territory in December 1909 and remained "dry" until May 1910. In a letter bearing date of May 7, 1909, Mike Vaccaro, after executing the above contract transmitted it to appellant and in such letter ordered one car of beer to be sent at once, if the bond was satisfactory. Appellant forwarded the beer to Mike Vaccaro and paid the freight thereon to Johnston City, Illinois. Thereafter Mike Vaccaro made frequent orders of car loads of beer, some of which were shipped to him direct and others to the Circolo Popolara Club, as directed by Mike Vaccaro. This shipping of beer continued long after May, 1910, at which time Johnston City again became wet territory. The total shipments of beer made by appellant to Mike Vaccaro amount to $26,848.20; the last shipment therein were made on March 4, 1911. Payments were made upon these shipments

from time to time amounting to $25,287.18; there remained a valance of $1,560.52 due from Mike Vaccaro to appellant, to recover which these suits were instituted.

We will first dispose of the case against Mike Vaccaro, No. 272, wherein he is sued as principal. The declaration filed consisted of the common law counts.

It is contended by appellee that as the contract provides that the beer should be furnished f. o. b. cars at Johnston City, Illinois, that the title remained in the appellant until its arrival at Johnston City, and that this was a delivery by appellant to appellee at Johnston City and constituted a sale at Johnston City in violation of the local option laws of Illinois, and rendered the contract void and that no recovery could be had upon such contract for any of the beer so shipped.

We agree with the contention of counsel for appellee, that as the contract provided that the beer should be delivered f.o.b. cars at Johnston City that it contemplated a delivery at this place. There is no doubt but the general rule is that in the absence of an agreement as to the place of delivery that the delivery by the vender to a common carrier is a delivery to the vendee at the place at which the common carrier received the goods and that the title to the property vests in the purchaser immediately upon such delivery to the carrier. City of Carthage vs. Duval, 92 Ill., 334. If, however, the contract provides that the shipment shall be f.o.b. cars at the vendee's home, or place of business, then the delivery to the common carrier will not be a delivery to the vendee but it must be delivered to vendee at his home or place of business before the title is vested in the vendee. Olson vs. Dubuque Coal Company, 126 App., 253.

from time to time amounting to $[illegible]; there remained a balance of $1,360.30 due from this vendee to appellant, to recover which these suits were instituted.

We will first dispose of the case against the vendee, No. 272, wherein he is sued as principal. The defendants filed counsels of the common law counts.

It is contended by appellee that as the contract provided that the beer should be furnished f. o. b. cars at Johnston City, Illinois, that the title remained in the appellant until its arrival at Johnston City, and that this was a delivery by appellant to appellee at Johnston City and constituted a sale at Johnston City in violation of the local option laws of Illinois, and rendered the contract void and that no recovery could be had upon such contract for any of the beer so shipped.

We agree with the contention of counsel for appellee, that as the contract provided that the beer should be delivered f.o.b. cars at Johnston City that it contemplated a delivery at this place. There is no doubt but the general rule is that in the absence of an agreement as to the place of delivery that the delivery by the vendor to a common carrier is a delivery to the vendee at the place at which the common carrier receives the goods and that the title to the property vests in the purchaser immediately upon such delivery to the carrier. City of Carthage vs. Duval, 102 Ill., 524. If, however, the contract provides that the shipment shall be f.o.b. cars at the vendee's place, or place of business, then the delivery to a common carrier will not be a delivery to the vendee but it must be delivered to vendee at his home or place of business before the title is vested in the vendee. Olson vs. Bauer Coal Company, 156 App., 524.

We are in accord with the contention of counsel for appellee that under the contract and payment of freight, etc., by appellant that appellant delivered the beer to the appellee in car load lots, on board the cars at Johnston City, Illinois, and that if such sale was in violation of and prohibited by the laws there could be no recovery. It appears from the evidence that the contract was accepted and its execution completed at Evansville, Indiana, and providedfor the delivery of the beer f.o.b. cars at Johnston, City, Illinois, and the question here presented for our determination is, Does the sale and delivery in the manner herein provided violate the local option law of Illinois? As this beer was shipped from the State of Indiana into the State of Illinois, it was undoubtedly an interstate shipment and for this reason counsel for appellant contends that such shipment and delivery is not in violation of the local option laws of this state, and that it is protected and exempted from the provisions of this statute by the Constitution of the United States, which provides, "The Congress shall have power ..... to regulate commerce with foreign nations and among the several states and with the Indian tribes." It has been uniformly held by the Supreme Court of the United States that the citizens of any state have the right to sell and ship any article of commerce to a citizen of another state, unless prohibited from so doing by act of congress. "Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters

We are in accord with the contention of appellee [illegible] lee that under the contract and payment of freight, ship.. by appellant that appellant delivered the beer to the appellee in car load lots, on board the cars at Johnston City, Illinois, and that if such sale was in violation of and prohibited by law there could be no recovery. It appears from the evidence that the contract was accepted and the execution completed at Evansville, Indiana, and provided for the delivery of the beer f.o.b. cars at Johnston City, Illinois, and the question here presented for our determination is, does the sale and delivery in the manner herein provided violate the local option law of Illinois? As this beer was shipped from the state of Indiana into the State of Illinois, it was undoubtedly an interstate shipment and for this reason counsel for appellant contend that such shipment and delivery is not in violation of the local option laws of this state, and that it is protected and exempted from the provisions of this statute by the Constitution of the United States, which provides, "The Congress shall have power ..... to regulate commerce with foreign nations and among the several states and with the Indian tribes." It has been uniformly held by the Supreme Court of the United States that the citizens of any st. to have the right to sell and ship any article of commerce to a citizen of another state, unless prohibited from so doing by act of congress. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the business shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in [illegible]

of local concern only, as hereafter mentioned, is [illegible] to such fredom." Robbins vs. Taxing District of Shelby Co., 1[illegible] U. S., p. 696.

It is quite clear, as we think, that until prohibited by Congress, any citizen may ship beer or other articles of commerce from one state into another.

The next question that arises is, What prohibition or regulation had Congress made, if any, prior to the making of this contract, and the shipping of this beer? The only regulation pointed out to us or that we have in our research been able to find is an act of Congress passed August 8, 1890, which provides, "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remain therein for use, consumption, sale or storage therein, shall upon arrival in said state or territory be subject, to the operation and effect of the law of such state or territory, enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Prior to this enactment of Congress, it was held by the Supreme Court of the United States that in a shipment made by the citizen of one state into another, that as long as it remained in the original package the importer could sell it, notwithstanding such sale was prohibited by a statute of the state into which it was shipped. Leisy vs. Hardin, 135 U. S. 100. After the passage of the act of Congress above referred to, it was claimed that by such act, that as soon as the intoxicating liquors came within the borders of the State to which they were imported, that they were at once subject to the

of local concern only, as heretofore mentioned, is regulated by such freedom." Robbins vs. Taxing District of Shelby Co., 194 U. S., p. 696.

It is quite clear, as we think, that until prohibited by Congress, any citizen may ship beer or other articles of commerce from one state into another.

The next question that arises is, that prohibition or regulation had Congress made, if any, prior to the making of this contract, and the shipping of this beer? The only regulation pointed out to us or that we have in our research been able to find is an act of Congress passed August 8, 1890, which provides: "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remain therein for use, consumption, sale or storage therein, shall upon arrival in said state or territory be subject, to the operation and effect of the law of such state or territory, enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Prior to this enactment of Congress, it was held by the Supreme Court of the United States that in a shipment made by the citizen of one state into another, that so long as it remained in the original package the importer could sell it, notwithstanding such sale was prohibited by a statute of the state into which it was shipped. Leisy vs. Hardin, 135 U. S. 100. After the passage of the act of Congress above referred to, it was claimed that by such act, that as soon as the intoxicating liquors came within the borders of the State to which they were imported, that they were at once subject to the

control of the state law prohibiting a delivery of them, and a construction of this act was given by the Supreme Court of the United States in the case of Rhoads vs. State of Iowa, 170 U. S., 412, in which it is said, "The Bowman case was decided in 1888, the opinion in Leisy vs. Hardin was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective states to attach to intoxicating liquors coming into the states by interstate shipment only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named, whilst retaining the full right to use the same, should no longer enjoy the right to sell free from the restrictions as to sale created by state legislation, a right which the decision in Leisy vs. Hardin had just previously declared to exist." And the Supreme Court, in giving its conlcusions in this case further says, "We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee, and of course this conclusion renders it entirely unnecessary to consider whether if the act of Congress had submitted the right to make interstate commerce shipments tostate control it would be repugnant to the Constitution." Shortly after the adoption of our local option statute its constitutionality was attacked and many points were presented to the Supreme Court of the State of Illinois regard-

control of the state law prohibiting a delivery of that, but a construction of this act was given by the Supreme Court of the United States in the case of Woods vs. State of Iowa, 170 U. S., 412, in which it is said, "The Kansas case was decided in 1888, the opinion in Leloy vs. Hardin was announced in April, 1890, the act under construction was approved August 8, 1890. Considering these dates it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective States to attach to intoxicating liquors coming into the state by interstate shipment only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named, might retaining the full right to use the same, should at liberty enjoy the right to sell free from the restrictions as to sale created by state legislation, a right which the decision in Leloy vs. Hardin had just previously declared to exist." And the Supreme Court, in giving its conclusions in this case further says, "We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee, and of course this conclusion renders it entirely unnecessary to consider whether if this act of Congress had submitted the right to make interstate commerce shipments lostate control it would be repugnant to the Constitution." Shortly after the adoption of our local option statute its constitutionality was attacked and many cases were presented to the Supreme Court of the State of Illinois regard-

ing its validity, and among them the point was made that the local option act was in violation of the interstate commerce clause of the Federal Constitution, and in passing upon that question the Supreme Court says, "Another point made by counsel is, that the act violates the interstate commerce clause of the Federal constitution, and although that question is not involved in this case and any invalidity of the provision would not effect the act, the position of counsel is not tenable. In the section designed to prevent evasion of the act it is provided that the taking of orders or the making of agreements in anti-saloon territory for the sale or delivery of intoxicating liquors shall be held to be an unlawful selling. We are required to interpret the act in such a was as to uphold it rather than in a way which would invalidate it, (People ex rel vs. Hinrichsen, 161 Ill., 223), and it is always presumed that the legislature did not intend to exceed, and have not, in fact, exceeded, their jurisdiction. (Endlich on Interpretation of Statutes, Sec. 171; Stanton vs. City of Chicago, 154 Ill.,,23). It is not necessary every time a law is passed that the legislature should specifically state that there is no intent to interfere with inter-State commerce or some other subject of which they have no jurisdiction. The act does not purport to control in any manner the importation of liquor from other states." People vs. McBride,234 Ill., 176.

It is contended by counsel for appellee that, "A contract made in one state for the sale of liquor in another, such as would be valid at common law, and which is not shown to be invalid, where made, will enable the seller to obtain an action for the price in the state where delivery is made, notwithstand-

ing its validity, and among them the point was made that the local option act was in violation of the interstate commerce clause of the Federal Constitution, and in passing upon that question the Supreme Court says, "Another point made by counsel is, that the act violates the interstate commerce clause of the Federal constitution, and although that question is not involved in this case and any invalidity of the provision would not effect the act, the position of counsel is not tenable. In the section designed to prevent evasion of the act it is provided that the taking of orders or the making of agreements in anti-saloon territory for the sale or delivery of intoxicating liquors shall be held to be an unlawful selling. We are required to interpret the act in such a way as to uphold it rather than in a way which would invalidate it. (People ex rel. Hirschman, 161 Ill., 229), and it is always presumed that the legislature did not intend to exceed, and have not, in fact, exceeded, their jurisdiction. (Indiana on Interpretation of Statutes, Sec. 171; Stanton vs. City of Chicago, 154 Ill.,93). It is not necessary every time a law is passed that the legislature should specifically state that there is no intent to interfere with inter-State commerce or some other subject of which they have no jurisdiction. The act does not purport to control in any manner the importation of liquor from other states." People vs. McBride,234 Ill., 176.

It is contended by counsel for appellee that, "A contract made in one state for the sale of liquor in another, such as would be valid at common law, and which is not shown to be invalid, where made, will enable the seller to obtain an action for the price in the state where delivery is made, notwithstanding

ing, if made in the latter state the contract would have been void. But this rule is of no avail in the face of statutes, such as have been enacted in several states providing that there shall be no recovery on a contract of this kind when the purchaser buys with a view to violating the laws of his own state, although the contract would have been good where made." We do not regard this rule of law as applicable, as there is no statute in Illinois prohibiting a recovery under such circumstances. The Supreme Court of Illinois, in passing upon a kindred question with reference to the transportation of liquors from another state into this state, says, in classifying the different kinds of nuisances enumerates three and says the second consists of "Those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc." ..... And later on in the opinion says, "As we view this case, under the stipulations in this record the transaction properly falls within the second class of nuisances as above classified, and could only become a nuisance from the manner in which it might be conducted, managed, etc. The right of the citizen to purchase goods for his own consumption from dealers in other States, and the right to have those goods carried and delivered to him, are to be classed among the highest rights of the citizen, and can only be curtailed when, in the manner of conducting the business, they may endanger the health, life or property of other citizens. There is nothing in intoxicating liquor inherently dangerous. It can only be said to be dangerous to those who use it. It is not like explosives or dangerous drugs, that may carry with them a

ing. If made in the latter state the contract would have been void. But this rule is of no avail in the face of statutes, such as have been enacted in several states providing that there shall be no recovery on a contract of this kind when the purchaser buys with a view to violating the laws of his own state, although the contract would have been good where made." We do not regard this rule of law as applicable, as there is no statute in Illinois prohibiting a recovery under such circumstances. The Supreme Court of Illinois, in passing upon a kindred question with reference to the transportation of liquors from another state into this state, says, in classifying the different kinds of nuisances enumerates three and says the second consists of "Those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc." ..... And later on in the opinion says, "As we view this case, under the stipulations in this record the transaction properly falls within the second class of nuisances as above classified, and could only become a nuisance from the manner in which it might be conducted, managed, etc. The right of the citizen to purchase goods for his own consumption from dealers in other States, and the right to have those goods carried and delivered to him, are to be classed among the highest rights of the citizen, and can only be curtailed when, in the manner of conducting the business, they endanger the health, life or property of other citizens. There is nothing in intoxicating liquor inherently dangerous. It can only be said to be dangerous to those who use it. It is not like explosives or dangerous drugs, that may carry with them a

menace to the persons and property of others, and there is nothing in the stipulation to disclose that the business so conducted was other than the ordinary course in relation to the carrying and delivering of other articles of trade and commerce that might be, and ordinarily are, carried by such companies. In other words, there is nothing to show that in the method of delivering or in the manner of conducting the business there was anything that could be said to be offensive to the public morals or good order, or could in any way tend to disturb anybody in his tranquility of mind, health or body, safety or right of property. In the absence of such showing it cannot be successfully contended that such business or transaction may be declared to be a nuisance." City of Carthage vs. Munsel, 203 Ill., 478.

From the views above expressed by our Supreme Court, with reference to the business of selling intoxicating liquors, we are of the opinion that even though liquors are purchased and imported into this state that the fact that the vender may have known that it was the intention of the purchaser to sell them unlawfully, that such knowledge would not bar a recovery by the vendor unless there was a statute prohibiting a recovery under such conditions.

We are of the opinion that the court erred in rendering judgment against the plaintiff for costs and for the reasons above set forth the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

(To be reported in full.)

The case of F. W. Cook Brewing Co. vs. Domenico Rodsetta and Antonia Vaccaro, No. 273, depends upon the validity of the

[illegible]

[illegible]

(To be reported in full.)

The case of J. W. Cook Brewing Co. vs. Lawrence Tuberty and Antonia Vaccaro, No. 272, depends upon the validity of the

contract entered into by Mike Vaccaro with appellant, upon which they were sureties, and as we have found in the former case that this contract is legal and binding upon Mike Vaccaro we see no reason why it is not also binding upon his sureties, the appellees in this case, and can see no reason why they are not liable for whatever amount is ascertained that Mike Vaccaro has failed to pay, and for the reasons set forth in the above opinion the judgment in this case is also reversed and remanded.

REVERSED AND REMANDED.

(Not to be reported in full.)

* * *

(See page 10 for order in No. 272.)

contract entered into by Mike Vaccaro with appellant, upon which they were sureties, and as we have found in the former case that this contract is legal and binding upon Mike Vaccaro we see no reason why it is not also binding upon his sureties, the appellees in this case, and can see no reason why they are not liable x for whatever amount is ascertained that Mike Vaccaro has failed to pay, and for the reasons set forth in the above opinion the judgment in this case is also reversed and remanded.

REVERSED AND REMANDED.

(Not to be reported in full.)

(See page 17 for order in No. 272.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 24th *day of July, A. D. 1914.*

Clerk of the Appellate Court.

OPINION

Fee $

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Young

vs.

E. St L & Sub. Ry Co.

No. 21

March Term, 1914.

~~ERROR TO~~
APPEAL FROM

188 I.A. 403

Circuit **COURT**

St Clair **COUNTY**

TRIAL JUDGE

Hon. W. E. Hadley

Term No. 21. Agenda No. 2.

March Term A.D. 1914.

August Young, Appellee,	)	
vs.	)	Appeal from the Circuit Court of St. Clair County.
East St.Louis & Suburban Railway Company, Appellant.	)	

188 I.A. 403

Mc Bride, J.

It appears from the record in this case that the appellee instituted a suit against appellant at the September Term, 1913, of the Circuit Court of St.Clair County,Illinois. The declaration was filed alleging that appellee was injured by reason of the negligence of appellant, and the cause was set for trial on the 23rd of October, 1913, and that between the time of the instituting of said suit and the date set for trial appellee settled his cause with appellant for the amount of $275.00,and agreed to dismiss his suit and pay the costs. Appellant paid appellee the $275.00 and appellee signed an agreement releasing appellant from any further liability; and it was further provided in said agreement that appellee was to dismiss the aforesaid suit at his cost. On the day set for trial the appellee failed to appear and a motion was interposed by appellant to dismiss the suit for want of prosecution, and for judgment against the plaintiff for costs, and in support of such motion presented a release and agreement containing the provision above set forth. The court refused to dismiss the suit at cost of plaintiff because it appeared

Term No. 21. Agenda No. 3.

March Term A.D. 1914.

August Young, Appellee, vs. East St.Louis & Suburban Railway Company, Appellant.	Appeal from the Circuit Court of St. Clair County.

Mc Bride, J.

It appears from the record in this case that the appellee instituted a suit against appellant at the September term, 1913, of the Circuit Court of St.Clair County, Illinois. The declaration was filed alleging that appellee was injured by reason of the negligence of appellant, and the cause was set for trial on the 22nd of October, 1913, and that between the time of the institution of said suit and the date set for trial appellee settled his cause with appellant for the amount of $275.00, and agreed to dismiss his suit and pay the costs. Appellant paid appellee the $275.00 and appellee signed an agreement releasing appellant from any further liability; and it was further provided in said agreement that appellee was to dismiss the aforesaid suit at his cost. On the day set for trial the appellee failed to appear and a motion was interposed by appellant to dismiss the suit for want of prosecution, and for judgment against the plaintiff for costs, and in support of such motion presented a release and agreement containing the provision above set forth. The court sustained to dismiss the suit at cost of plaintiff because it appeared

that the plaintiff was insolvent and unable to pay, and the court of its own motion rendered judgment against the defendant, (appellant here) for costs; to review which appellant prosecutes this appeal.

It does not appear from the record that the appellant had prior to the commencement of the suit, procured an order of court to prosecute as a poor person. This, however, would not permit the court to render a judgment against the defendant for costs, under the agreement herein presented. It is provided by Section 8, Chapter 33 of Purd's Revised Statutes, that if the plaintiff be non-suited or fails to prosecute his suit that the defendant shall have judgment to recover his costs.

It was the duty of the court upon the presentation of this agreement, if properly identified, to dismiss the suit at the cost of the plaintiff, unless an order had been entered permitting the plaintiff, ~~xxxxxxx~~ to prosecute as a poor person. The plaintiff was in default, failed to prosecute his suit, and doing so the court would have no authority whatever to render a judgment against the defendant for costs.

We think the court erred in rendering judgment against the defendant for costs, and the judgment of the lower court is reversed.

Judgment reversed.

****

(Not to be reported in full)

that the plaintiff was insolvent and unable to pay costs out of its own motion rendered judgment against the defendant. (appellant here) for costs; to reverse which appellant prosecutes this appeal.

It does not appear from the record that the appellee was prior to the commencement of the suit, granted an order of court to prosecute as a poor person. This, however, would not permit the court to render a judgment against the defendant for costs, under the agreement herein recited. It is provided by Section 8, Chapter 32 of Purd's Revised Statutes, that if the plaintiff be non-suited or fails to prosecute his suit that the defendant shall have judgment to recover his costs.

It was the duty of the court upon the presentation of this agreement, if properly identified, to dismiss the suit at the cost of the plaintiff, unless an order had been entered permitting the plaintiff, xxxxxxx to prosecute as a poor person. The plaintiff was in default, failed to prosecute his suit, and hence so the court would have no authority whatever to render a judgment against the defendant for costs.

We think the court erred in rendering judgment against the defendant for costs, and the judgment of the lower court is reversed.

Judgment reversed.

****

(Not to be reported in full)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

Clerk of the Appellate Court

OPINION

Fee $

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 21st *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Town of Canteen

vs.

No. 26

March Term, 1911.

Nubur et al

~~ERROR TO~~
APPEAL FROM

188 I.A. 405

City COURT

St Louis ~~COUNTY~~

TRIAL JUDGE

Hon. M. M. Vandeventer

Term 26. [illegible] No. 1.

March Term A.D. 1914.

Town of Canteen, Appellant,	)	
Vs.	)	Appeal from the city Court of
Fred Weber and Martha Weber, Appellee.	)	East St. Louis, Illinois.

188 I A 405

Mc Bride, J.

Appellant instituted a prosecution against the appellees on December 23, 1912, for obstructing a highway known as the Cookson Road in Canteen Township, St.Clair County, Illinois. The charge is, that the appellees built a fence in the middle of the road covering one half of the road and extending about three hundred feet in the road parallel with the road, and that this obstruction was placed there during the month of June 1912, and that appellees had been notified verbally, and the appellee Fred Weber, in writing, to remove this obstruction.

It further appears that they promised to remove the obstruction if ten days time were given them, but after waiting even longer than the ten days they failed to remove the obstruction, and therefore this suit was instituted.

The penalty sought to be recovered is under section 71, Chapter 121 of Burd's Revised Statute of Illinois, which provides. "If any person shall injure or obstruct a public road by felling a tree, or trees in, upon or across the same, or by placing or leaving any other obstruction thereon, or encroaching upon the same with any fence, etc. ********** shall forfeit for every such offense a sum not less than three dollars, nor more than ten dollars". The Section also provides that an additional sum of

Form 26. Docket No. 3.

March Term A.D. 1914.

Town of Centerville, Appellant.	
Vs.	Appeal from the city Court of East St. Louis, Illinois.
Fred Weber and Martha Weber, Appellees.	

No Brief, 1.

Appellant instituted a prosecution against the appellees on December 23, 1912, for obstructing a highway known as the Cookson Road in Centerville Township, St.Clair County,Illinois. The charge is, that the appellees built a fence in the middle of the road covering one half of the road and extending about three hundred feet in the road parallel with the road, and that this obstruction was placed there during the month of June 1912, and that appellees had been notified verbally, and the appellee Fred Weber, in writing, to remove this obstruction.

It further appears that they promised to remove the obstruction if ten days time were given them, but after waiting even longer than the ten days they failed to remove the obstruction, and therefore this suit was instituted.

The penalty sought to be recovered is under Section 71, Chapter 121 of Hurd's Revised Statute of Illinois, which provides, "If any person shall injure or obstruct a public road by felling a tree, or trees in, upon or across the same, or by placing or leaving any other obstruction thereon, or encroaching upon the same with any fence, etc. ********** shall forfeit for every such offense a sum not less than three dollars, nor more than ten dollars". The Section also provides that an additional sum of

not exceeding three dollars per day for every day such obstruction shall remain after having been ordered to remove same by the commissioners.

The case was tried before a jury and a verdict returned finding the defendants not guilty. The plaintiff prosecutes this appeal.

The appellant assigns as error that the verdict of the jury is contrary to the evidence and the law. That the court erred in giving appellee instruction No.1 and that the court erred in overruling appellant's motion for a new trial.

While other errors have been assigned, these are the only ones that we think it necessary to notice in the determination of this case. While it is true that all of the errors above mentioned have not been argued specifically by appellant, yet when considered in their relation to the argument made it will be necessary to pass upon all of them. It is insisted by counsel for appellant, and we think properly, that the verdict of the jury is manifestly against the weight of the evidence, but in determining this question it is proper to notice the theory upon which this case was tried. We are of the opinion that the case was tried upon an incorrect theory as to the period of time which a road must be used by the public to constitute it a public highway. Both parties have presented the case upon the theory that twenty years user was necessary to make this road a public highway. This is a mistaken view of the law. Section 1, Chapter 121, Hurd's Revised Statutes which has been in force since July 1st, 1887, provides "That all roads in this state which have been laid out in pursuance of any law of this state or of the territory of Illinois, or which have been established by dedication or used by the public as a highway for fifteen years, and which have not been vacated in pursuance of law are

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hereby declared to be public highways', and the Supreme Court has sustained the doctrine that since the enactment of this statute a period of user for fifteen years is all that is required. City of Chicago vs. Gault--224 Ill.,421.

The instruction given by the court in behalf of the appellee advises the jury that to constitute this road a public highway it was necessary that it should be used as a road for a period of at least twenty years. This, it will be observed, is not in accordance with the statute, and much of the testimony introduced upon the trial of this case fixes the period during which this road had been used as a highway at from eight to twenty years; and the testimony of one of the witnesses, who appeared to give the most definite information with reference to the use of this highway, fixes it at sixteen years, and under this instruction his testimony together with that of other witnesses would be entirely ignored. The witness, Louis Mburdin, said he traveled over this road and known it for fifteen, probably twenty years, and that during that time it was of the width of sixty feet. J.T.Coolson said, "We traveled it for the last forty years, over the identical place in dispute here". Carl Olvig says, "I traveled over it with my produce; the width of it was sixty feet; it was used by the public for its full width. People would occasionally use different parts of it when the road was bad; it was a sixty foot road. It had been used for that width for the past sixteen or seventeen years. For fifteen years I have traveled over it myself." Other witnesses also testified to the use of this road for periods ranging from four to twenty years and this is not disputed by the evidence of the appellee but it seems to be practically conceded that the road had been traveled at least from fifteen to twenty years, and if it had, then under the law it became a public highway.

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It further appears from the evidence that the appellees obstructed the road by building a fence for the distance of three hundred feet along about the center of the road and [illegible] with it. Under the evidence as presented by this record we are of the opinion that the verdict of the jury was manifestly against the weight of the evidence and that the case ought to be retried. On the former trial of this case the court in behalf of the appellant gave instructions that we deem it proper to call attention to, so, that they may be corrected in another trial. The court at the request of appellant instructed the jury, in substance, that if a road is used and traveled by the public as a highway and is recognized and kept in repair as such by the highway commissioners, that proof of these facts furnish a legal presumption liable to be rebutted that such road is a public highway. This theory seems to be supported by the case of Neely vs. Brown et al. 1st Gilman 10. A later decision of the Supreme Court, however, in the case of Grube vs. Nichols, 3 Ill., 92, seems to be in conflict with the former decision, and being the later utterance would necessarily prevail. It appears from this latter case that upon the trial it was recognized that if the road was used and worked and kept in repair by the public authorities that this would constitute it a highway. We are of the opinion that this case was tried upon an incorrect theory as to the law covering the period for which a road must be used to constitute it a public highway, and that the verdict of the jury was manifestly against the weight of the evidence.

It also assigned as error that the court improperly rendered judgment against the town for costs, which in all probability was inadvertently done but this was error as the town is not liable for costs in prosecutions of this character. Town of [illegible] vs. Lacey, 133 App., 208.

It further appears from the evidence that the appellees obstructed the road by building a fence for the distance of five hundred feet along about the center of the road and erected with it. Under the evidence as presented by this record we are of the opinion that the verdict of the jury was manifestly against the weight of the evidence and that the case ought to be retried. On the former trial of this case the court in behalf of the appellant gave instructions that we deem it proper to call attention to, so, that they may be corrected in another trial. The court at the request of appellant instructed the jury, in substance, that if a road is used and traveled by the public as a highway and is recognized and kept in repair as such by the highway commissioners, that proof of these facts furnish a legal presumption liable to be rebutted that such road is a public highway. This theory seems to be supported by the case of Neely vs. Brown et al. 1ut Ottman 10. A later decision of the Supreme Court, however, in the case of Crabb vs. McKenzie, 36 Ill., 92, seems to be in conflict with the former decision, and being the later utterance would necessarily prevail. It appears from this latter case that upon the trial it was recognized that if the road was used and worked and kept in repair by the public authorities that this would constitute it a highway. We are of the opinion that this case was tried upon an incorrect theory as to the law covering the period for which a road must be used to constitute it a public highway, and that the verdict of the jury was manifestly against the weight of the evidence.

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For the errors above indicated we are of the opinion that the judgment of the lower court should be reversed and the cause remanded for a new trial.

Reversed and Remanded.

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(Not to be reported in full).

For the errors above indicated we are of the opinion that the judgment of the lower court should be reversed and the cause remanded for a new trial.

Reversed and Remanded.

****

(Not to be reported in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July A. D. 1914.*

Clerk of the Appellate Court

OPINION

Fee $

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Hausman
a dw.

vs.

No. 30

March Term, 1914.

I.C.R.R. Co.

~~ERROR TO~~
APPEAL FROM

188 I.A. 414

City COURT

E. St. Louis ~~COUNTY~~

TRIAL JUDGE

Hon. R. H. Flanagan

Term No. 30. Agenda No. 11.

March Term, A. D. 1914.

Royal M. Hamman, Administrator of the estate of Phillip Hamman, Deceased, Appellee, vs. Illinois Central Railroad Company, A-ppellant.	Appeal from the City Court of East St. Louis.

188 I. A. 411

McBride, J.

The plaintiff in the trial below obtained a judgment against the defendant which it seeks to reverse by this appeal. On the 29th of July, Phillip H. Hamman was killed by one of defendant's trains at a highway crossing known as the Chartrand Crossing, on what is called the Falling Springs road or avenue, near thesouthwest limits of the city of East St. Louis. At this place the appellant's railroad consists of three tracks, extending nearly north and south, and are located about thirty feet apart. The east track is called the inbound track, the second outbound track and the third the yard track. A pair of scales is located upon the yard track and at the distance of about three hundred fifty feet south of the Chartrand Crossing. The Falling Springs Highway crosses these tracks at an angle of about thirty degrees, the highway extending nearly northeast and southwest. The tracks are elevated the distance of from four to six feet at the place where this highway crosses and the center of the highway at the place is graded in such a manner as to make an approach on to these tracks. On the day in question the deceased, Phillip Hamman and a Mr. Abbot had been engaged at work in a field near this crossing and it being the

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The plaintiff in the trial below obtained a judgment against the defendant which it seeks to reverse by this appeal. On the 29th of July, Philip H. Hamman was killed by one of defendant's trains at a highway crossing known as the Chartrand Crossing, on what is called the Mailing Springs road or avenue, near the southwest limits of the city of East St. Louis. At this place the appellant's railroad consists of three tracks, extending nearly north and south, and are located about thirty feet apart. The east track is called the inbound track, the second outbound track and the third the yard track. A pair of scales is located upon the yard track and at the distance of about three hundred fifty feet south of the Chartrand Crossing. The Mailing Springs Highway crosses these tracks at an angle of about thirty degrees, the highway extending nearly northeast and southwest. The tracks are elevated the distance of from four to six feet at the place where this highway crosses and the center of the highway at the place is graded in such a manner as to make an approach on to these tracks. On the day in question the deceased, Philip Hamman and a Mr. Abbot had been engaged at work in a field near this crossing and it being the

noon hour had ceased work and were preparing to eat their dinner and from some cause undertook to cross appellant's tracks. A short time before the deceased and abbot undertook to cross the tracks the appellant's servants passed along this yard track with an engine, going up to the scales for the purpose of weighing the cars. The engine was on the south end of the cars and after weighhing them the engine pushed the four cars back to the north and towards Chartrand Crossing, the engine being in the rear with the cars in front, and was running at the rate of from four to six miles an hour. At this time another train was passing along the inbound track going in the same direction, towards the north, at the rate of about fifteen miles per hour and consisted of quite a number of cars, making a train of considerable length. Just before the engine with the four cars reached Chartrand Crossing the deceased and Abbot walked upon the yard track, apparently engaged in watching the train that was passing on the inbound track, and while they were upon the yard track the front car of the train upon that track struck them and killedthem.

The declaration consists of three counts: the first one, after the formal part, charges "And while the said Phillip Hanman with all due care and caution was then walking across the said railroad at the said crossing upon the said public street, the defendant then and there by its said servants so carelessly and improperly drove and managed the said locomotive engine and train that by and through the negligence and improper conduct of the defendant, by its servants in that behalf, the said locomotive engine was then and there attached to said train of cars backed in front of said locomotive engine on one of its said several tracks and did not have any flagman at said crossing

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nor any switchman, nor brakeman on the front car of said train. The said locomotive engine and train then and there ran and struck the said Phillip Hamman on and about his head and body with great force and violence, etc.

The second count charges defendant with having failed to ring the bell or blow the whistle upon approaching said crossing, as required by statute; in addition to the allegations contained in the first count.

The third count, after setting forth the facts substantially as alleged in the first count of the declaration, also alleges the existence of an ordinance in the city of East St.Louis, requiring that the bell on the locomotive shall be rung continuously while running within said city, and avers a failure to ring the bell as required by said ordinance. The defendant filed a plea of not guilty.

The cause was heard and a verdict for appellee for four thousand dollars, upon which the court rendered judgment. Several errors have been assigned by counsel for appellant but as we view the case, it will not be necessary to notice all of them. The first point argued by appellant is, that the negligence charged in the first count of the declaration is not that of carelessness and improper driving and managing the engine and train but it is that of pushing a train of cars over the crossing without a flagman at the crossing, and without having a switchman or brakeman on the front car of the train. And concludes by saying, that there is no law or ordinance requiring a flagman at this crossing or a switchman or brakeman to ride on the front end of the cut of cars traveling in broad daylight, and that the allegations are not sufficient to support a judgment.

We do not believe that this declaration is subject to the

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We do not believe that this declaration is subject to this

criticism offered. It seems to us that the fair interpretation of the declaration is, that the defendant, by its servants, improperly drove and managed the said locomotive engine and train, in this, that the said locomotive engine was then and there pushing said train of cars back in front of said locomotive engine, on one of its said switch tracks, and did not have any flagman at said crossing, nor any switchman nor brakeman on the front car of said train, and that all of these elements are united in the count as constituting negligence, which we are inclined to think, under the circumstances, would constitute negligence and would be sufficient to sustain a judgment, especially after a verdict.

It is also contended that the evidence does not show the appellant to have been guilty of negligence or that the appellee was in the exercise of due care for his own safety. It is true that the evidence as to the negligence, and especially as to the due care of the deceased at the time of the injury, is not very clear and convincing. While it appears that the deceased could by having looked have seen the train approaching and possibly avoided the danger, yet the circumstances of a train running upon the inbound track at the same time, which was probably attracting the attention of the travelers, and the further circumstance of their traveling at such an angle that their backs were nearly towards this approaching train and that it approached so noiselessly were all matters to be considered by the jury as circumstances from which the jury might excuse the party from looking or listening. The courts lay down the doctrine,"That a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party ex-

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posed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various modifying circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence per se." Chi. & N.W.R.R. Co. vs. Dunleavy, 129 Ill., 132; Winn vs. C.C. C. & S. L. R. R., 239 Ill., 132. So that as we read the decision of the Supreme Court, under such circumstances it is a question for the jury to determine whether or not the deceased was in the exercise of due care for his own safety. These, however, are matters upon which another jury must pass in this case, and we will omit any particular comment upon the evidence.

Appellant further contends that the giving of appellee's second instruction was reversible error. This instruction is, "If the jury believe from the evidence that the deceased was free from negligence on his part in attempting to cross the track, or railroad, that the defendant's servants in charge of the train were guilty of negligence, either in running over the crossing in question at a greater speed than was usual and than was reasonably safe to persons about to cross the track, or in not ringing the bell or sounding the whistle continuously for the distance of eighty rods before reaching the crossing, and that by reason such negligence the deceased was injured, then the jury should find the issues for the plaintiff." It will be observed that this instruction directed a verdict and injects into the case the question of running over the crossing "At a greater speed than was usual and than was reasonably safe to

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persons about to cross the track." There is nothing in the declaration charging defendant with having operated its train at an excessive speed or at an unusual speed, and we are of the opinion that in the giving of the instruction the court should have confined appellee's right to recovery, the the charges set forth in his declaration, and that it was reversible error to embody in the instruction, elements of negligence not set forth in the declaration. Justice Wilkins in the case of Consolidated Coal Co. vs. Yung, 24 App., 258, says, "When the declaration alleges the personal negligence of the defendant as the ground of liability it is a fatal objection to instructions that they direct the attention of the jury to other and different elements of liability." C.C. & I. C. R. R. Co. vs. Troesch, 68 Ill., 547. "An instruction which allows a recovery for negligence in general respects without limitation to the particulars of negligence specified in the declaration, is too broad." C. & A. R. R. Co. vs. Mock, 72 Ill., 141; E. & W. R. Co. vs. People, 96 Ill., 584.

It further appears from this record that there is no evidence whatever upon which to base this instruction. We have been unable to find any evidence tending to show that this train was being run at an unusual rate of speed or that it was run at a greater rate of speed than was reasonably safe for persons about to cross the track. It was said by the Supreme Court that as "no evidence was offered to show that the servants of the defendant in charge of the train were incompetent, careless or unskillful, and in the absence of such evidence there was nothing on which to base the second instruction. It was not to be presumed because of the happening of the accident alone. It was

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error to give the second instruction for the plaintiff." I. & O. R. R. vs. Godfrey, 155,Ill., 82. The jury could reasonably infer from this instruction an assumption of the existence of the factsas set forth therein, and for that reason, the court, in the case of Nieman vs. Schnitker, 181 Ill., 406, condemns it and says "The fact that the court assumes to state the law applicable to particular states of case is of itself an assumption that those states of case exist, for it is not to be presumed a court would give the law to the jury while trying a case, with reference to questions not believed to be before them." And the court there held that the giving of such instruction was erroneous and the case was reversed.

Owing to the character of the acts of negligence and due care proven in this case, we are of the opinion that it is highly important that the jury should have been correctly instructed, and we believe that the instruction referred to was of a character calculated to mislead the jury adn permit them to assume as elements of negligence matters that were not in the case, and that the giving of the instruction under such circumstances was reversible error, and the judgment of the lower court is reversed and the cause remanded.

REVERSED AND REMANDED.

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(Not to be reported in full.)

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Owing to the character of the acts of negligence and due care proven in this case, we are of the opinion that it is highly important that the jury should have been correctly instructed, and we believe that the instruction referred to was of a character calculated to mislead the jury and permit them to assume as elements of negligence matters that were not in the case, and that the giving of the instruction under such circumstances was reversible error, and the judgment of the lower court is reversed and the cause remanded.

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I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

Clerk of the Appellate Court.

OPINION

Fee $

1320

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Milkins

vs.

No. 36

March Term, 1914.

Madison Coal Corporation

~~ERROR TO~~
APPEAL FROM

183 I.A. 416

Circuit COURT

Madison COUNTY

TRIAL JUDGE

Hon. Geo. A. Cox

Term No. 36. Agenda No. 41.

March Term, A. D. 1914.

Gerret Wilkins, Appellee, vs. Madison Coal Corporation, Appellant.	Appeal from the Circuit Court of Madison County.

McBride, J.

A jury was waived and trial had before the Judge by consent of the parties, which resulted in a judgment for the plaintiff for $2,999.00, to reverse which the defendant prosecutes this appeal.

At the time of the injury complained of appellee was engaged in running a machine used in under-cutting coal in one of appellant's mines. He, with his buddy, was operating a machine in a cross-cut that was being opened up off from room No. 1, towards room No. 2, off of the 14th North entry on the main east entry. The fall and injury occurred Wednesday, November 1, 1911, at some time after eleven o'clock. The mine had not been in operation on the day before but on Monday before appellee and his buddy were engaged in undercutting this cross-cut and had cut two boards, beginning at the left, but had to quit on account of there being some down coal at the right of the cross-cut which had to be cleaned up before they could complete the cut. At about three o'clock on Wednesday morning, November 1st, the mine examiner examined this cross-cut, and carried with him in the making of the examination, as he testifies, an iron rod about two and one-half feet long and half inch in diameter with a knob on the end about one inch in diameter; and also carried a safety lamp and an anemometer. He testified that he

Term No. 36. Agenda No. 41.

March Term, A. D. 1914.

Garret Wilkins, Appellee, vs. Madison Coal Corporation, Appellant.	Appeal from the Circuit Court of Madison County.

McBride, J.

A jury was waived and trial had before the judge by consent of the parties, which resulted in a judgment for the plaintiff for $2,999.00, to reverse which the defendant prosecutes this appeal.

At the time of the injury complained of appellee was engaged in running a machine used in under-cutting coal in one of appellant's mines. He, with his buddy, was operating a machine in a cross-cut that was being opened up off from room No. 1, towards room No. 2, off of the 14th North entry on the main east entry. The fall and injury occurred Wednesday, November 1, 1911, at some time after eleven o'clock. The mine had not been in operation on the day before but on Monday before appellee and his buddy were engaged in undercutting this cross-cut and had cut two boards, beginning at the left, but had to quit on account of there being some down coal at the right of the cross-cut which had to be cleaned up before they could complete the cut. At about three o'clock on Wednesday morning, November 1st, the mine examiner examined this cross-cut, and carried with him in the making of the examination, as he testifies, an iron rod about two and one-half feet long and half inch in diameter with a knob on the end about one inch in diameter; and also carried a safety lamp and an anemometer. He testified that he

examined the roof of this cross-cut, thoroughly sounding the roof from one side to the other and found the roof solid, made his visitation mark 1/11/11 and reported the cross-cut safe. At about eight o'clock in the morning of the same day the loaders who had been engaged in cleaning up the coal in this room came into the room for the purpose of examining it, expecting to shoot and load out the coal as soon as the under-cutting was completed. At this time they both testified they sounded the roof carefully and found it solid and no loose or dangerous coal, and proceeded to complete the loading of the down coal that had been left at the right hand side of the room. After they had finished loading this coal appellee and his buddy, at about ten o'clock in the morning, came into the cross-cut to complete the under-cutting. They testified that shortly after they commenced work they discovered some loose or hanging coal at about eight feet from the face and near a cross bar. That they notified the loaders to set a prop under this loose coal, which they did, and after the prop was set the roof was again sounded and ascertained to be solid. Thereupon the appellee and his buddy proceeded to operate their machine and after it had been at work for about fifteen minutes another part of the roof, a part that had been solid heretofore, became detached and fell upon appellee and injured him. The portion that fell was not that which had been propped but was a part of that which had been sounded and found to be solid.

There are two counts in the declaration. The first charges, that on said date and prior thereto there existed in the roof of said cross-cut and over the working place therein, a lot of slate, dirt, rock and other material that was insecure and dangerous and likely to come down at any time and injure those at work in under-

examined the roof of this cross-cut, thoroughly sounding the roof from one side to the other and found the roof solid, made his visitation mark I\II\II and reported the cross-cut safe. At about eight o'clock in the morning of the same day the loaders who had been engaged in cleaning up the coal in this room came into the room for the purpose of examining it, expecting to shoot and load out the coal as soon as the under-cutting was completed. At this time they both testified they sounded the roof carefully and found it solid and no loose or dangerous coal, and proceeded to complete the loading of the down coal that had been left at the right hand side of the room. After they had finished loading this coal appellee and his buddy, at about ten o'clock in the morning, came into the cross-cut to complete the under-cutting. They testified that shortly after they commenced work they discovered some loose or hanging coal at about eight feet from the face and near a cross bar. That they notified the loaders to set a prop under this loose coal, which they did, and after the prop was set the roof was again sounded and ascertained to be solid. Thereupon the appellee and his buddy proceeded to operate their machine and after it had been at work for about fifteen minutes another part of the roof, a part that had been solid heretofore, became detached and fell upon appellee and injured him. The portion that fell was not that which had been propped but was a part of that which had been sounded and found to be solid.

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cutting and loading coal therein, of which the defendant then and there well knew, and that the defendant wilfully failed and omitted to inspect said roof at said point and to observe said dangerous roof thereat.

The second count charges that there existedin the roof of said cross-cut and over the working place therein a lot of loose, cracked and dangerous slate, dirt, rock and other material which was likely to come down at any time and injure servants of the defendant engaged in working in said cross-cut, of which the defendant then and there well knew. That the mine examiner within twelve hours inspected the place and observed said dangerous roof at said point, and wilfully failed and omitted to place a co spicuous mark or sign thereat as notice to all men to keep out, and wilfully failed to make a daily record of the conditions asrequired by statute.

Several errors have been assigned and argued by counsel for appellant but as we view this case there is but one question that is necessary to be considered and that is, Was the cross-cut in question in a dangerous condition at the time the mine examiner examined it, and if so, did he mark it as dangerous? There is no dispute as to the fact that the roof or cross-cut was not marked as dangerous. It is, however, contended by counsel for appellant that the reason it was not so marked was because it was not dangerous at that time and did not require to be marked as such, and this is the real question that is presented and argued by counsel for appellant and appellee. At the time that the mine examiner passed through the cross-cut, examined it and sounded the roof, he says that he sounded it thoroughly and found the roof solid and found no loose conditions existing in the roof. The next persons that

cutting and loading coal therein, of which the defendant then and there well knew, and that the defendant wilfully failed and omitted to inspect said roof at said point and to observe said dangerous roof thereat.

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Several errors have been assigned and argued by counsel for appellant but as we view this case there is but one question that is necessary to be considered and that is, was the cross-cut in question in a dangerous condition at the time the mine examiner examined it, and if so, did he mark it as dangerous? There is no dispute as to the fact that the roof of cross-cut was not marked as dangerous. It is, however, contended by counsel for appellant that the reason it was not so marked was because it was not dangerous at that time and did not require to be marked as such, and this is the real question that is presented and argued by counsel for appellant and appellee. At the time that the mine examiner passed through the cross-cut, examined it and sounded the roof, he says that he sounded it thoroughly and found the roof solid and found no loose conditions existing in the roof. The next persons that

were in this ~~rm~~ cross-cut were Louis Arnaldi and Fred Dryer, who went into that cross-cut at about eight o'clock in the morning, and as they were expecting to shoot and load the coal that was being then under-cut both testified they sounded the roof of this cross-cut from side to side and found it solid, andfound no loose doal of any character in theroof at that time. The next parties that came into the cross-cut were appellee and his buddy who came in at about ten o'clock in the morning for the purpose of completing the board that they had commenced to cut. That shortly after they began work they discovered some loose or hanging coal, near the first cross-bar, from the face and called upon the loaders to set a prop under this hanging coal, which they did, and after the prop had been set under the coal the roof was again sounded and it was then determined that it was sound and no loose coal. Appellee and his buddy had been engaged at work operating the machine but a short time when some of the coal near the face that had sounded solid but a few minutes before became loose, fell upon appellee and injured him.

The declaration alleges that this dangerous condition existed at the time the mine examiner was in the room and examined it, and the burden was upon the plaintiff to show such conditions. Cook vs. Big Muddy Coal & Mining Co., 249 Ill., 41; Odorizzi vs. Southern Coal & Mining Co., 151 App., 393. We do not believe that the evidence in this record sustains the allegation but are of the opinion that the weight of the evidence shows that at the time the mine examiner visited this cross-cut the condition complainedof did not then exist. We think it affirmatively appears, not only that the roof was solid at that

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time but in the morning at eight o'clock two disinterested witnesses testified that the roof was then solid and no indications of loose coal existing. It is contended by counsel for appellee that adangerous condition did in fact exist, and the mere fact that the examiner did not ascertain it would not excuse appellant from liability. This is probably true as a legal proposition, if such physical facts were disclosed as ought to have caused the mine examiner to see the danger and that in passing upon the dangerous condition his judgment was at fault and failed to appreciate the danger that the physical facts indicated. We do not understand that if there are no physical facts indicating a dangerous or unsafe condition that the appellant can be made liable simply because it afterwards turned out that a latent danger not discoverable really existed and an injury resulted therefrom. Much reliance is placed by counsel for appellee, in support of this position, upon the case of Piazzi vs. Kerens-Donnewald Coal Co., 262 Ill., 33 (Advance Sheets), which was decided by this court and affirmed by the Supreme Court, which sustains the doctrine that although the mine examiner may have examined the place and in good faith believed that the conditions were not dangerous, yet the appellant would be liable. There is, however, a marked difference between that case and the present one. In that case there was a clod that hung from the roof of the cross-cut, which the mine examiner could see, and did see, but he did not seem to appreciate that it was dangerous; but in the present case, the evidence shows that so far as the physical facts that were visible or could be ascertained, by the means required by statute, there was nothing to indicate a dangerous condition, and we must conclude that the dangerous condi-

time but in the morning at eight o'clock two disinterested witnesses testified that the roof was then solid and no indications of loose coal existing. It is contended by counsel for appellee that dangerous condition did in fact exist, and the mere fact that the examiner did not ascertain it would not excuse appellant from liability. This is probably true as a legal proposition, if such physical facts were disclosed as ought to have caused the mine examiner to see the danger and that in passing upon the dangerous condition his judgment was at fault and failed to appreciate the danger that the physical facts indicated. We do not understand that if there are no physical facts indicating a dangerous or unsafe condition that the appellant can be made liable simply because it afterwards turned out that a latent danger not discoverable really existed and an injury resulted therefrom. Much reliance is placed by counsel for appellee, in support of this position, upon the case of Pittsburg v. Kerens-Donnewald Coal Co., 262 Ill., 33 (Advance Sheets), which was decided by this court and affirmed by the Supreme Court, which sustains the doctrine that although the mine examiner may have examined the place and in good faith believed that the conditions were not dangerous, yet the appellant would be liable. There is, however, a marked difference between that case and the present one. In that case there was a clod that hung from the roof of the cross-cut, which the mine examiner could see, and did see, but he did not seem to appreciate that it was dangerous; but in the present case, the evidence shows that so far as the physical facts that were visible or could be ascertained, by the means required by statute, there was nothing to indicate a dangerous condition, and we must conclude that the dangerous condi-

tion arose even after the room had been examined by the loaders in the morning.

It is further contended that the question as to whether or not a dangerous condition existed was for the trial court to determine. This, as a legal proposition, is true, if there is evidence in the record to support it, but, as we have above stated, we do not find any evidence in this record to sustain that position.

It is also said that one of the witnesses discovered a slip in the roof after this prop had been set, but it is further shown by the testimony that this slip was not discernable at the former examinations, and that it frequently happens that you could not discover a slip until some of the coal had fallen.

We think the principles laid down by this court in the case of Vyskocil vs. Edwardsville Home Trade Coal Co., decided at the October Term (not yet reported) are controlling in this case, and that the appellee failed to show that the dangerous condition complained of existed in the roof of this cross-cut at the time the mine examiner visited the room, and this being true he was not required, under the law, to mark it in any manner, except to place on the walls thereof his visiting mark, which he did.

Viewing the evidence in this case as we do we are of the opinion that the findings of the court are manifestly against the weight of the evidence, and the judgment of the lower court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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(Not to be reported in full.)

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We think the principles laid down by this court in the case of Yalcott vs. Edwardsville Home Trade Coal Co., decided at the October Term (not yet reported) are controlling in this case, and that the appellee failed to show that the dangerous condition complained of existed in the roof or this cross-cut at the time the mine examiner visited the room, and this being true he was not required, under the law, to mark it in any manner, except to place on the walls thereof his visiting mark, which he did.

Viewing the evidence in this case as we do we are of the opinion that the findings of the court are manifestly against the weight of the evidence, and the judgment of the lower court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

Clerk of the Appellate Court.

OPINION

Fee $

1321

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

188 I.A. 418

The People, use Dunn.

vs.

No. 37

March Term, 1914.

Moore

~~ERROR TO~~
APPEAL FROM

County COURT

Johnson COUNTY

TRIAL JUDGE

Hon. J. T. Hight

Term No. 37. Agenda No. [illegible].

March Term A.D. 1914.

The People of the State of Illinois, for the use of Betty Dunn, Appellee,	
vs.	Appeal from the County Court of Johnson County.
Roy Moore, Appellant.	

188 I. [illegible] 18[illegible]

Mc Bride J.

This is a suit prosecuted by Betty Dunn and against Roy Moore charging him with being the father of her bastard child that was born to her on January 19,1913. It is claimed by her that said child was begotten by the appellant on the night of April 13,1912, and the complaint was filed December 1,1913. So far as preserved by the record the usual conflict of evidence exists. The evidence of Betty Dunn and her witnesses tend to show that the appellant had sexual intercourse with her and was the father of the child, which is denied by him. It is contended, and some evidence offered tending to prove, that at about this time other parties had sexual intercourse with her. The trial resulted in a verdict, finding the appellant to be the father of the child and judgment was entered by the court requiring the defendant to pay $50.00 for its support and from this judgment the appellant prosecutes his appeal and assigns four errors which will be noticed but not in the order assigned.

In the fourth error appellant complains of the action of the court in refusing to set aside the verdict and grant a new trial, claiming that the verdict is manifestly against the

Term No. 37. Agenda No. 44.

March term A.D. 1914.

The people of the state of Illinois, for the use of Betty Dunn, Appellee.	
vs.	Appeal from the Circuit Court of Johnson County.
Roy Moore, Appellant.	

Mr. Justice 4.

This is a suit prosecuted by Betty Dunn as against Roy Moore charging him with being the father of her bastard child that was born to her on January 19, 1913. It is claimed by her that said child was begotten by the appellant on the [illegible] April 13, 1912, and the complaint was filed [illegible] 1913. So far as preserved by the record the usual conflict of evidence exists. The evidence of Betty Dunn and her witnesses tend to show that the appellant had sexual intercourse with her and was the father of the child, which is denied by him. It is also asserted, and some evidence offered tending to prove, that at about this time the other parties had sexual intercourse with her. The trial resulted in a verdict, finding the appellant to be the father of the child and judgment was entered by the court requiring the defendant to pay $250.00 for its support and from this judgment the appellant prosecutes his appeal and assigns four errors which will be noticed but not in the order assigned.

In the fourth error appellant complains of the action of the court in refusing to set aside the verdict and grant a new trial, claiming that the verdict is manifestly against the

evidence.

There is not any certificate of the Judge in this case that the record here presented contains all of the evidence offered on the trial. It is true that the reporter states that the foregoing is all of the evidence and signed it as reporter, but this is not sufficient, for the making of this certificate is a judicial act and must be performed by the Judge. The authority cannot be delegated to the reporter and cannot even be delegated to the parties to make a bill of exceptions by agreement. Hallers vs. Whittier Machine Co., 170 Ill., [illegible], Pointon vs. St.Louis A.& T.H.R.R.Co.-90 App.683.

The law is well settled that where such a certificate from the Judge, is not incorporated in the bill of exceptions then the Appellate court must presume that the jury and the court were warranted in finding the verdict and judgment rendered and we can not interfere with such verdict on an appeal. The Judge before whom the case was tried does not state that the bill of exceptions contains all of the evidence, and the certificate of the reporter cannot be taken as a substitute for the certificate by the Judge. Cogshall vs. Beesley, 76 Ill., [illegible] Young vs. City of Fairfield 173 App. 311. The presumption of law is that the evidence was sufficient to support the verdict of the jury and the judgment of the court, and said evidence can not be reviewed for the purpose of determining its sufficiency.

Complaint is also made, by counsel for appellant, of the ruling of the trial court in permitting the prosecuting witness to exhibit and display such bastard child to the jury in the manner she did. The evidence shows that the prosecuting witness had the child in court, and that at the time she was near the jury with the child, to which counsel for appellant objected and the court immediately required her to remove

evidence.

There is not any certificate of the judge in this case that the record here presented contains all of the evidence offered on the trial. It is true that the reporter states that the foregoing is all of the evidence and signed it -- [illegible], but this is not sufficient, for the making of this certificate is a judicial act and must be performed by the judge. The authority cannot be delegated to the reporter and cannot even be delegated to the parties to make a bill of exceptions by agreement. Hallare vs. Whitter Machine Co., 170 Ill., 4[illegible]; Pointon vs. St. Louis A.& T.H.R.R.Co.-80 Ap. 65[illegible].

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Complaint is also made, by counsel for appellant, of the ruling of the trial court in permitting the prosecuting attorney to exhibit and display such weapon which is the weapon the manner she did. The evidence shows that the prosecuting witness had the child in court, and that at one time she met near the jury with the child, to which counsel for appellant objected and the court immediately rebuked her to remove

with the child to the other part of the room. There was no effort, as shown by this testimony to make an exhibit of this child to the jury or to give the jury an opportunity to examine the child critically, and the actions are not within the rule which prohibits the exhibit of the child to the jury for the purpose of letting them determine from its appearance whether or n t it resembles the defendant. All we can see, with reference to the presence of this child, from this record, is, that the child was in the court room with the mother; as we understand the law it is not error to have the child present in the court room. Benes vs. People, etc., 141, App. 103.

It is next complained that the court refused to permit the prosecuting witness to answer questions propounded her upon cross-examinati n with reference to whether or not April 1st was the first time that she had ever had sexual intercourse and that if she had not stated on other occasions that this was the first man with whom she had ever had any improper relati n. We have examined these questions carefully, some of them were very improper, and the objections were well sustained by the court; others of them did not, as we understand this evidence, do anything more than to show on former occasions she had claimed to be a virtuous woman. We do n t think this was a material question as it could make no difference whether she was a virtuous or not, if the defendant was the father of the child he is bound in law to support it, and the sole question before the jury was as to the paternity of the child. We are not able to say that the court committed any error in sustaining the objections to this cross examination.

It is next complained that the court erred in the giving of instructions for the plaintiff. Instruction one is criticised because it tells the jury that in determining the weight of the evidence and the credit to be given to the testimony of several witnesses, they may apply their experience and knowledge

with the child to the other part of the year. There was no effort, as shown by this statement, to make an exhibit of this child to the jury or to give the jury an opportunity to examine the child critically, and the actions are not within the rule which prohibits the exhibit of the child to the jury for the purpose of letting them determine from the appearance whether or not it resembles the defendant. All we can gather from reference to the presence of this child from this record, is that the child was in the court room with the mother; we understand the law it is not error to have the child present in the court room. Dawes vs. People, etc., 1ill. App. 108.

It is next complained that the court refused to permit the prosecuting witness to answer questions proponded her upon cross-examination with reference to whether or not April 1st was the first time that she had ever had sexual intercourse and that if she had not stated on other occasions that this was the first man with whom she had ever had any improper relations. We have examined these questions carefully, some of them were very improper, and the objections were well sustained by the court; others of them did not, as we understand this evidence, in anything more than to show on former occasions she had claimed to be a virtuous woman. We do not think this was a material question as it could make no difference whether she was a virtuous or not, if the defendant was the father of the child he is bound in law to support it, and the sole question before the jury was as to the paternity of the child. We are not this so say that the court committed any error in sustaining the objections to this cross examination.

It is next complained that the court erred in the giving of instructions for the plaintiff. Instruction one is criticised because it tells the jury that in determining the weight of the evidence and the credit to be given to the testimony of the several witnesses, the, may apply their experience and knowledge

to all the facts and circumstances proven in the case. I think the criticism is without merit. The jury had the [illegible], and it was their duty, to apply whatever experience and knowledge they may have had in determining the facts in this case.

It is claimed that instruction No. 2 is erroneous in having told the jury that they are not "bound" to believe a fact merely because a witness has testified to it and "should not do so" if from all the facts and circumstances proved the witness is mistaken or testified falsely. The objection urged is that the jury are liable to think that they are not to look at other evidence. The giving of this instruction is not error.

Instructions four and five are criticised because they tell the jury that they are not bound to take the testimony of any witness as absolutely true and they should not do so if they are satisfied from all the facts and circumstances proven on the trial that the witness is mistaken, or testified falsely. We cannot see any objection to this instruction, besides instruction one given on behalf of defendant imbodies the same principle, and the criticism is not well taken.

Instruction eight is criticised because it tells the jury that even if the prosecuting witness had intercourse with other persons such fact would not warrant the jury in finding the defendant not guilty, if they believe from a preponderance of the evidence that the defendant is the father of such bastard child. This, we understand, to be the law and the criticism is without merit.

Instruction three which reads as follows; "You are instructed that the credibility of the witnesses is a question exclusively for the jury; and the law is that where a number of witnesses testify directly opposite to each other the jury are not [illegible]

to all the facts and circumstances proven in the case.

think the criticism is without merit. The jury has the right and it was their duty, to apply whatever experience and knowledge they may have had in determining the facts in this case.

It is claimed that instruction No. 5 is erroneous in having told the jury that they are not "bound" to believe a fact merely because a witness has testified to it and "should not do so" if from all the facts and circumstances proved the witness is mistaken or testified falsely. The objection might be that the jury are liable to think that they are not to look at other evidence. The giving of this instruction is not error.

Instructions four and five are criticised because they tell the jury that they are not bound to take the testimony of any witness as absolutely true and they should not do so if they are satisfied from all the facts and circumstances proven on the trial that the witness is mistaken, or testified falsely. We cannot see any objection to this instruction, besides instruction one given on behalf of defendant imbodies the same principle and the criticism is not well taken.

Instruction eight is criticised because it tells the jury that even if the prosecuting witness had intercourse with other persons such fact would not warrant the jury in finding the defendant not guilty, if they believe from a preponderance of the evidence that the defendant is the father of such mentioned child. This, we understand, to be the law and the criticism is without merit.

Instruction three which reads as follows; "You are instructed that the credibility of the witnesses is a question exclusively for the jury; and the law is that where a number of witnesses testify directly opposite to each other the jury are not compel-

to consider the weight of the evidence as evenly balanced. The jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, their [illegible] candor and fairness and from all the other surrounding circumstances appearing on the trial which witness or witnesses are most worthy of credit and give credit accordingly". We are inclined to agree with counsel that this instruction standing alone is subject to criticism. It is true that an instruction similar to this one, was criticised by Justice Ayres in the case of Ryan vs. The People, 144 App., 463, because it omitted the expression "All the evidence in the case", but he said, in the opinion rendered, "Under the state of the evidence shown in the record, considering the degree of proof required to convict in a criminal case, it was highly important that the instruction given to the jury should be substantially correct in statement of the law, and in form, without apparent bias or misleading suggestion". It will be observed that this instruction does not direct a verdict.

Instructions one, three and eight, given on behalf of the defendant, and one and four given on behalf of the plaintiff, expressly advise the jury that in determining the issues in the case they must take into consideration all of the evidence, facts and circumstances proven on the trial. In the case of Balswic vs. Balswic, 179 App. 118, where a criticism of a similar instruction was made, the court said, "The first criticism made by appellant is that it did not confine the jury to the consideration of the facts and circumstances in evidence, but allowed them to go outside the evidence to find facts and circumstances. While not technically accurate we cannot see that this instruction was harmful to appellant. While the precise point raised in

to consider the weight of the evidence as evenly balanced. The jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness and from all the other surrounding circumstances appearing on the trial which witness or witnesses are most worthy of credit and give credit accordingly". . . are inclined to agree with counsel that this instruction standing alone is subject to criticism. It is true that an instruction similar to this one, was criticized by Justice Brown in the case of Egan vs. The People, 158 Ill. 467, because it omitted the expression "All the evidence in the case", but he said, in the opinion rendered, "Under the state of the evidence shown in the record, considering the degree of proof required to warrant in a criminal case, it was highly important that the instructions given to the jury should be substantially correct in statement of the law, and in form, without apparent bias or misleading suggestion". It will be observed that this instruction does not direct a verdict.

Instructions one, three and eight, given on behalf of the defendant, and one and four given on behalf of the plaintiff, expressly advise the jury that in determining the issues in the case they must take into consideration all of the evidence, and and circumstances proven on the trial. In the case of Malsto vs. Belewie, 179 Ill. App. 118, where a criticism of a similar instruction was made, the court said, "The first criticism made by appellant is that it did not confine the jury to the consideration of the facts and circumstances in evidence, but allowed them to go outside the evidence to find facts and circumstances. While not technically correct we cannot see that this instruction was harmful to appellant. While the greater part of the

this case was not specifically argued in the following cases, yet in Chicago & R.I.R.Co. vs. Rains, 106 Ill.App., [illegible], and in the Supreme Court in Pioneer Cooperage Co. vs. [illegible], 186 Ill., 9, an instruction similar in phraseology is held to be good. Even if it be conceded that this instruction is erroneous this court would not be justified in reversing the judgment for such an error because appellant fell into a similar or worse error in some of his given instructions, in which the words, "under all the circumstances" or "if the facts and circumstances" were used, and is therefore in no situation to complain". While we believe that the instruction is subject to criticism, yet we are not able to say that the jury was misled in any manner by the instruction, or that a different result would have been reached if the instruction had been strictly accurate. When all of the instructions are considered we are satisfied that the court was liberal in its instructions given on behalf of the defendant. This is not a criminal case, as was the one referred to by Justice Myers in Ryan vs. People, Supra, but is only a civil proceeding and brought to enforce the payment of a sum of money for the support of the child. We are not able to say that the court committed reversible error in the giving of this instruction.

It is next contended that the judgment rendered by the court is not in conformity with the statute and is erroneous in requiring to bind sureties to pay whatever judgment might be rendered against the defendant for the support and maintenance of said bastard child, before and in advance of the judgment being rendered, just upon their oral appearance in court ". We have examined the record in this case and find that the criticism is not well taken as the judgment is rendered against the defendant only, and not against the sureties, as claimed. It is true

this case was not specifically argued in the following cases, yet in Chicago & N.W.Co. vs. Heine, 108 Ill.,[illegible], and in the Supreme Court in Pioneer Cooperage Co. vs.[illegible] 186 Ill., 9, an instruction similar in phraseology is held to be good. Even if it be conceded that this instruction is erroneous this court would not be justified in reversing the judgment for such an error because appellant fell into a similar or worse error in some of his given instructions, in which the words, "under all the circumstances" or "if the facts and circumstances" were used, and is therefore in no attitude to complain". While we believe that the instruction is subject to criticism, yet we are not able to say that the jury was misled in any manner by the instruction, or that a different result would have been reached if the instruction had been strictly accurate. When all of the instructions are considered we are satisfied that the court was liberal in the instructions given on behalf of the defendant. This is not a criminal case, as was the one referred to by Justice Myers in Ryan vs.[illegible], supra, but is only a civil proceeding and brought to enforce the payment of a sum of money for the support of the child. We are not able to say that the court committed reversible error in the giving of this instruction.

It is next contended that the judgment rendered by the court is not in conformity with the statute and is erroneous in requiring to bind sureties to pay whatever judgment might be rendered against the defendant for the support and maintenance of said bastard child, before and in advance of the judgment being rendered, just upon their oral appearance in court ". In lieu thereof the record in this case and find that the criticism is not well taken as the judgment is rendered against the defendant only, and not against the sureties, as claimed. It is true

their appearance and agreement made in open court, prior to the rendition of judgment that the bondsmen shall be bound for the payment of the judgment appears in the record, but that is not in any manner incorporated in the judgment, and would, after all, be only an agreement to be enforced in a proper manner. The objection is not well taken.

There being no certificate of the trial Judge that all of the evidence introduced on the trial was preserved in the record, thatlaw requires us to presume that the evidence was sufficient to warrant a verdict and judgment in this case. When it is determined that the evidence is sufficient to warrant a verdict, we cannot see that there is any such error in the rulings of the court upon the evidence, or the giving of the instructions, as would warrant a reversal. If the defendent is the father of the child, as the jury and trial Judge have found, then it is his duty to help support the child and he ought not to be allowed to escape from such support through a mere technicality in the instructions, or exclusion of evidence, unless it is made to clearly appear that he was prejudiced in his rights by such rulings of the court. Nothing of the kind appears in this record. We are satisfied with the verdict of the jury and the judgment of the court, and the judgment is affirmed.

Judgment affirmed.

******* **** *

(Not to be reported in full)

their appearance and agreement made in open court, prior to the rendition of judgment that the bondsmen shall be bound for the payment of the judgment appears in the record, but that is not in any manner incorporated in the judgment, and could, after all, be only an agreement to be enforced in a proper manner. The objection is not well taken.

There being no certificate of the trial judge that all of the evidence introduced on the trial was preserved in the record, thetlaw requires us to presume that the evidence was sufficient to warrant a verdict and judgment in this case. When it is determined that the evidence is sufficient to warrant a verdict, we cannot see that there is any such error in the rulings of the court upon the evidence, or the giving of the instructions, as would warrant a reversal. If the defendant is the father of the child, as the jury and trial judge have found, then it is his duty to help support the child and he ought not to be allowed to escape from such support through a mere technicality in the instructions, or exclusion of evidence, unless it is made so clearly appear that he was prejudiced in his rights by such rulings of the court. Nothing of the kind appears in this record. We are satisfied with the verdict of the jury and the judgment of the court, and the judgment is affirmed.

Judgment affirmed.

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(Not to be reported in full)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 25th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Dallas

vs.

No. 38

March Term, 1914.

E. St Louis & Sub-Ry Co.

~~ERROR TO~~
APPEAL FROM

188 I.A. 420

Circuit COURT

Madison COUNTY

TRIAL JUDGE

Hon. W. E. Hadley

Term No. 38. Agenda No. 47.

March Term A.D. 1914.

Iva Dallas, Appellee, vs. East St.Louis & Suburban Railway Company, Appellant.	Appeal from the Circuit Court of Madison County, Illinois.

188 I.A. 420

Mc Bride J.

Upon a trial of this case the plaintiff obtained a judgment in the court below for three thousand dollars, which the defendant seeks to reverse by this appeal. The declaration which consisted of one count alleges that on October 16,1913, appellant was possessed of and operating an electric railroad in the city of Collinsville, Madison County, Illinois. That appellee was a passenger on appellant's car for reward, to be carried from Hesperie Street to Sycamore Street in Collinsville. That it was the duty of the defendant to stop said car at the corner of Main and Sycamore streets in said city, a reasonable time to allow plaintiff to alight therefrom; that defendant had regarding its duty in that behalf, and when said car arrived at plaintiff's destination, and while plaintiff with all due care and caution was upon the rear platform of said car for the purpose of alighting therefrom, carelessly and negligently by its servants caused the speed of the car to be reduced and almost stopped and then without warning to the plaintiff and before said car had wholly stopped, and before plaintiff had allowed opportunity to alight from said car, suddenly and violently caused said car to be jerked, thereby throwing the

Term No. 36. Agenda No. 47.

March Term A.D. 1914.

Ivo Dallas, Appellee, vs. East St.Louis & Southern Railway Company, Appellant.	Appeal from the Circuit Court of Madison County, Illinois.

Mr. Justice D.

Upon a trial of this case the plaintiff obtained a judgment in the court below for three thousand dollars, which the defendant seeks to reverse by this appeal. The declaration upon which consisted of one count alleges that on October 16, 1910, appellant was possessed of and operating an electric railroad in the city of Collinsville, Madison County, Illinois. That appellee was a passenger on appellant's car for reward, to be carried from Hagerie Street to Bonanza Street in Collinsville. That it was the duty of the defendant to stop said car at the corner of Main and Bonanza streets in said city a reasonable time to allow plaintiff to alight therefrom; that defendant not regarding its duty in that behalf, and when said car arrived at plaintiff's destination, and while plaintiff with all due care and caution was upon the rear platform of said car for the purpose of alighting therefrom, carelessly and negligently by its servants caused the speed of the car to be reduced and almost stopped and then without warning to the plaintiff and before said car had wholly stopped, and before plaintiff was allowed opportunity to alight from said car, suddenly and violently caused said car to be jerked, thereby throwing the

plaintiff with great force and violence from off of said car upon the ground, or paved street, by means whereof she was permanently injured. To this declaration the appellant filed the plea of general issue.

IT appears from the evidence in this case that appellant was operating an electric railway between Collinsville and Edgemont and that about noon of the 16th day of October 1914, appellee became a passenger to be carried from Hargrove street to Sycamore Street in Collinsville, upon a west bound car. The final destination of appellee was Edgemont, but she desired to stop at Sycamore street for the purpose of delivering some orders to a Mr. Wells who lived near said street. The evidence that shortly after becoming a passenger upon said car she asked the conductor if he would stop the car at Sycamore street long enough to permit her to deliver some orders to Mr. Wells; that he told her they were behind time and could not do so and she thereupon paid her fare to Sycamore Street. The conductor, however, denies having told her that he would not stop long enough at Sycamore Street to permit her to deliver the orders and claims that he intended to stop for her at that street, and claims that just before arriving at said street he gave the motorman a signal to stop there. Appelle claims that after passing the last street before reaching Sycamore street, that it became apparent to her that the car was not going to stop at Sycamore street and she pushed the button on the side of the car and gave the motorman herself the signal to stop there; that the car began to slacken its speed and just before reaching the street she arose from her seat and walked to the rear door of the car and stepped out into the vestibule when the car gave a sudden jerk and threw her from the car on to the pavement, injuring her very badly. The appellant denies that the car

plaintiff with great force and violence from off the car and upon the ground, or paved street, by means whereof she was permanently injured. To this declaration the defendant filed the plea of general issue.

It appears from the evidence in this case that defendant was operating an electric railway between Collinsville and Edgemont and that about noon of the 16th day of October 1914, appellee became a passenger to be carried from Edgecote street to Sycamore street in Collinsville, upon a west bound car. The final destination of appellee was Edgemont, but she desired to stop at Sycamore street for the purpose of delivering some orders to a Mr. Wells who lived near said street. The evidence that shortly after becoming a passenger upon said car she asked the conductor if he would stop the car at Sycamore street long enough to permit her to deliver some orders to Mr. Wells; that he told her they were behind time and could not do so and thereupon paid her fare to Sycamore street. The conductor, however, denies having told her that he would not stop long enough at Sycamore street to permit her to deliver the orders and claims that he intended to stop for her at that street, and claims that just before arriving at said street he gave the motorman a signal to stop there. Appellee claims that after passing the last street before reaching Sycamore street, it became apparent to her that the car was not going to stop at Sycamore street and she pushed the button on the side of the car and gave the motorman herself the signal to stop there; that the car began to slacken its speed and just before reaching the street she arose from her seat and walked to the rear end of the car and stepped out into the vestibule when the car gave a sudden jerk and threw her from the car on to the pavement, injuring her very badly. The appellant denies that the car

started suddenly or jerked and threw her off of the car, and claims that she walked out into the vestibule and down on the steps and jumped off of the car before it stopped.

The principal question in dispute in this case is, did the appellant, after the appellee came out to the vestibule of the car and while the car was being slowed down, start up the car with a sudden jerk and throw appellee on to the pavement, and did she step into the vestibule and wait for the car to stop or attempt to get off of the car while it was still in motion.

It is insisted by counsel for appellant that the verdict of the jury is manifestly against the weight of the evidence in this case and this is the vital matter presented to the court for determination. It appears from the evidence that there were about fifteen passengers on board this car at the time of the injury, and appellee stands practically alone in her contention that the car after slowing down started up suddenly and gave a jerk and threw her off, while five of the passengers that were on board the car, the motorman and conductor all say that the car did not give a jerk, and three of the passengers testified that she walked off of the car without waiting for it to stop. Appelle testified, "As the car neared Sycamore street I saw the conductor was busy changing fares; three or four girls got on and I thought he was not going to ring the bell, so I pushed the bell myself and walked to the back end of the car and then it almost stopped. I stepped into the vestibule and I thought they were going to stop; I dont remember anything until they carried me into the doctor's office. I stepped out to the rear platform with the intention of, as soon as it stopped, to alight, but there was a jerk and I dont remember anything more until they carried me into doctor Gigel's office. The street was paved. I dont know how I struck the pavement." This is the whole of appellee's testimony in support of her declaration that the car gave a sudden jerk after she went out

started suddenly or jerked and threw the girl off of the car, and claims that she walked out into the vestibule and down the steps and jumped off of the car before it stopped.

The principal question in dispute in this case is, is the appellant, after the appellee came out to the vestibule of the car and while the car was being slowed down, stepped on the car with a sudden jerk and throw appellee on to the pavement, and did she step into the vestibule and wait for the car to stop or attempt to get off of the car while it was ~~still~~ in motion.

It is insisted by counsel for appellant that the verdict of the jury is manifestly against the weight of the evidence in this case and this is the vital matter remanded to us for determination. It appears from the evidence that there were about fifteen passengers on board this car at the time of the injury, and appellee stands practically alone in her contention that the car after slowing down started up suddenly and gave a jerk and threw her off, while five of the passengers that were on board the car, the motorman and conductor all say that the car did not give a jerk, and three of the passengers testified that she walked off of the car without waiting for it to stop. Appelle testified, "As the car neared Sycamore street I saw the conductor was busy changing fares; there is some girls got on and I thought he was not going to ring the bell, so I pushed the bell myself and walked to the back end of the car and then it almost stopped. I stepped into the vestibule and I thought they were going to stop;I dont remember anything until they carried me into the doctor's office. I stepped out to the rear platform with the intention of, as soon as it stopped, to alight, but there was a jerk and I dont remember anything more until they carried me into Doctor Nigel's office. The street was paved. I dont know how I stepped the pavement." This is the whole of appellee's testimony in support of her contention that the car gave a sudden jerk after she had

into the vestibule. Counsel for appellee contends that Louis Wells testified that the car gave a sudden jerk. Wells testified that he lived west of where the railroad crosses Sycamore Street. It appears that immediately after Mrs. Dallas fell on the pavement that Ambrosat, one of the passengers caught the bell rope and gave two signals and the conductor immediately gave a third, or danger signal, to stop immediately and that the car then stopped suddenly. Mr. Wells in his examination in chief says nothing about the car stopping or jerking but on cross examination he says, "Q-Did you see the car jerk? A. Well it seemed to jerk to me, it seemed to almost stop and then go forward. Q.--Then Mrs. Dallas was lying on the ground? A. Yes; I didnt see her fall out of the car". Mr. Wells was at least one hundred feet west of the car and we are satisfied that he did not observe the movements of the car until after Mrs. Dallas had fallen on the pavement and this is what attracted his attention to the car.

It is next contended by counsel for appellee that Henry Brecka, a witness for appellant, testified that the car stopped awful sudden; which is true, but as we read this witness's testimony the sudden and unusual stop referred to by him occurred after Mrs. Dallas fell on the pavement and was in consequence of the ~~xxxxxxxx~~ danger signals given. He says, "My attention was attracted by the unusual stop; the car stopped awful sudden. The mototman was in the front of the car and he came part way and we saw there was something unusual. I dont know that there were any signals given. I would not say that there were none given. Prior to the time my attention was attracted by the stopping of the car I know of nothing unusual by the motion of the car. I didn't know who had gotten off of the car". While upon the part of the witnesses for appellant the mototman Edward Owen testified, "There was no violent jerk or sudden start of the

into the vestibule. Counsel for appellee contends that Mrs. Wells testified that the car gave a sudden jerk. Mrs. Wells testified that he lived west of where the zoological grounds Sycamore Street. It appears that immediately after Mr. Dallas fell on the pavement that Amboseat, one of the passengers, sounded the bell rope and gave two signals and the conductor immediately gave a third, or danger signal, to stop immediately and then the car then stopped suddenly. Mr. Wells in his examination in chief says nothing about the car stopping or jerking but on cross examination he says, "Did you see the car jerk? A. Well it seemed to jerk to me, it seemed to almost stop and then go forward. Q.--Then Mrs. Dallas was lying on the ground? A. Yes; I didn't see her fall out of the car". Mr. Wells was at least one hundred feet west of the car and he testified that he did not observe the movements of the car until after Mrs. Dallas had fallen on the pavement and this is what attracted his attention to the car.

It is next contended by counsel for appellee that Henry Brooks, a witness for appellant, testified that the car stopped with sudden; which is true, but as we read this witness's testimony the sudden and unusual stop referred to by him occurred after Mrs. Dallas fell on the pavement and was in consequence of the danger signals given. The sudden stop attracted was attracted by the unusual stop; the car stopped until sudden. The motorman was in the front of the car and he could not see what there was something unusual. I don't know that there were any signals given. I would not say that there were none given. Prior to the time my attention was attracted by the stopping of the car I knew of nothing unusual by the motion of the car. I didn't know who had gotten off of the car". [illegible] part of the witnesses for appellant the motorman testified, testified, "There was no violent jerk or sudden start of the

car prior to the sounding of these signals I testified about". (Referring to danger signals). "There was just the usual stop or stopping of the car until I received the bells then it may have made a violent stop, or unusually hard stop".

Jacquet, the conductor says, "I felt the car going to stop just as nice as you please and was in the front end of the car, in the smoker. When the car was going very slow, about to come to a stop, I heard two bells".

Joe Ambrosat, a passenger upon the car testified, "Prior to the time I gave the two bells after Mrs. Dallas stepped off there was no unusual motion or jerk of the car". And again, he says, "I saw this lady get off the car; I saw her walk out; when she came out of the door she just walked out, had a little bundle in her hand, left; walked on out and walked right out. Seemed to me like she didn't pay no attention to nothing; just walked right on out. I saw her when she came out in the vestibule; she was walking fast;when she got outside of the door she just walked right off; had her pocketbook and a little bundle in her left hand. She was holding it in this way. But as she walked out she grabbed the handle with her right hand and walked right on out; she grabbed the handle, facing the back of the car, as she walked out; that is the handle at the rear end of the car. She didn't stop at the rear end of the car, she didn't stop anytime in the vestibule. The car was running. I don't remember just how she got off, I know she walked off. She was facing out towards the door, out the door. She was holding on to a grab handle; she had her right hand holding the grab handle. She was facing out from the car in the act of getting off. Her face was turned towards the rear end of the car".

car prior to the slamming of those signals I testified about".

(Referring to danger signals). "There was just the usual stop or stopping of the car until I received the bells then I may have made a violent stop, or unusually hard stop".

Jacquet, the conductor says, "Left the car coming to a stop just as nice as you please and was in the front end of the car, in the smoker. When the car was going very slow, about to come to a stop, I heard two bells".

Joe Ambrosat, a passenger upon the car testified, "Prior to the time I gave the two bells after-wards. Taking steps off there was no unusual motion or jerk of the car". And again, he says, "I saw this lady get off the car; I saw her walk out; when she came out of the door she just walked out, - had a little bundle in her hand, left; walked on out and walked right off. Seemed to me like she didn't pay no attention to nothing; just walked right on out. I saw her when she came out in the vestibule; she was walking fast; when she got outside of the door she just walked right off; had her pocketbook and a little bundle in her left hand. She was holding it in this way, and as she walked out she grabbed the bundle with her right hand and walked right on out; she grabbed the bundle, facing the back of the car, as she walked out; that is the bundle at the rear end of the car. She didn't stop at the rear end of the car, she didn't stop anytime in the vestibule. The car was running. I don't remember just how she got off, I know she walked off. She was facing out towards the door, out the door. She was holding on to a grab handle; she had her right hand holding the grab handle. She was facing out from the car in the act of getting off. Her face was turned towards the rear end of the car".

Roscoe Wilson, another passenger, testified, [illegible] the time that the two signals were given by Mr. Ambrosat, "and while the car was slowing down, there was no unusual jerk of the car, nothing more than usual". "I saw her coming out of the car and step out into the vestibule and walk out, on out of the vestibule; she seemed to be in a hurry. I didn't see her step at the door leading from the car proper into the vestibule. [illegible] stop anywhere from the time I saw her in the aisle going out. She just walked right out of the car into the vestibule and turned and walked right out of the vestibule. When she went off of the car she faced in the opposite direction the car was going. When she walked out into the vestibule she faced the steps; when she came into the vestibule and started out she turned kind of in the direction the car was going".

C.M.Seay, another passenger, testified, "Immediately prior to the time Mrs. Dallas stepped or walked off of the car it was coming to a stop. There was no jerk of the car before she walked off; she was coming to her usual stop. I never noticed Mrs. Dallas until she got on the rear platform. She [illegible] off the car, she just walked straight off".

The witnesses Ambrosia, Wilson and Seay were standing on the rear platform. Henry Brecka, another passenger, who was seated in the car, says, "Prior to the time that my attention was attracted by the stopping of the car I know of nothing unusual about the motion of the car. I didn't know who had gotten off the car".

Paul Fisher, another passenger says, that prior to the time his attention was attracted to the accident there was nothing unusual about the motion of the car. George F. Gill, another passenger, says, "Before the signals were given there was no unusual motion of the car that I know of; just the ordinary running of the car".

Jessie Tilson, another passenger, testified, "Prior to the time that the brakes were applied by Mr. Ambrose, and while the car was slowing down, there was no unusual jar of the car, nothing more than usual". "I saw her coming out of the door and step out into the vestibule and walk out, or out of the vestibule; she seemed to be in a hurry. I didn't see her step at the door leading from the car proper into the vestibule. She did not stop anywhere from the time I saw her in the vestibule going out, she just walked right out of the car into the vestibule and walked right out of the vestibule. When she went out of the car she faced in the opposite direction the car was going. When she walked out into the vestibule she faced the steps; she came into the vestibule and started out she turned in the direction the car was going".

C.M.Seay, another passenger, testified, "Immediately prior to the time Mrs. Dallas stepped or walked off of the car it was coming to a stop. There was no jerk of the car before she walked off; she was coming to her usual stop. I never noticed Mrs. Dallas until she got on the rear platform, she was waiting off the car, she just walked straight off".

The witnesses Ambrose, Tilson and Seay were standing on the rear platform. Henry Brooks, another passenger, who was seated in the car, says, "Prior to the time that my attention was attracted by the stopping of the car I knew of nothing unusual about the motion of the car. I didn't know who had gotten off the car".

Paul Fisher, another passenger says, that prior to the time his attention was attracted to the accident there was nothing unusual about the motion of the car. George E. Williams, another passenger, says, "Before the brakes were given there was no unusual motion of the car that I knew of; just the ordinary running of the car".

The evidence of the witnesses for appellant greatly preponderates over the testimony of appellee in showing that the car did not stop with a sudden jerk, as testified to by appellee and also that she did not step in the vestibule but walked straight out and attempted to get off the car while it was in motion. We can see no motive or interest that these witnesses could have in telling an untruth about this matter and no reason why due credit should not be accorded to their testimony. While it is the duty of a court of review to sustain the verdict of a jury where it can reasonably be done, but where courts of appeal upon the consideration of the testimony find that the verdict of the jury is greatly against the weight of the evidence, then it becomes the duty of such appellate court, where the law as it exists in this case, to reverse the judgment of the trial court. C.& A.R.R. vs.Heinrich--157 Ill.,368.

We have read this record carefully and feel constrained to hold that the evidence in this case largely preponderates in favor of the appellant, both upon the proposition of the negligence of the appellant and the want of due care of appellee. We also we agree with the contention of counsel for appellant that it is not reasonable to infer that she desired to commit suicide, nor do we deem it necessary to infer this ~~xxxxxxxxxx~~ to sustain the contention and statement of the witnesses of appellant. It may be that she was absorbed in thought about other matters and not giving the proper attention to alighting from the car and this does not excuse her. While we are compelled to say that the verdict of the jury is manifestly against the weight of the evidence, yet we are not inclined to reverse with a finding of facts.

The judgment of the lower court is reversed and the cause remanded.

Reversed and Remanded.

(Not to be reported in full)

The evidence of the witnesses for appellant greatly preponderates over the testimony of appellee in behalf of the car did not stop with a sudden jerk, as testified to by appellee and also that she did not step in the wastebule but walked straight out and attempted to get off the car while it was in motion. We can see no motive or interest that these witnesses could have in telling an untruth about the matter and no reason why due credit should not be accorded to their testimony. Now it is the duty of a court of review to sustain the verdict of a jury where it can reasonably be done, and where certain appeal upon the consideration of the testimony that the verdict of the jury is greatly against the weight of the evidence then it becomes the duty of such appellate court, under the as it exists in this case, to reverse the judgment of the trial court. C.& A.R.R. vs.Heinrich--127 Ill.,388.

We have read this record carefully and feel constrained to hold that the evidence in this case largely preponderates in favor of the appellant, both upon the proposition of the negligence of the appellant and the want of due care of appellee. We would we agree with the contention of counsel for appellee that it is not reasonable to infer that the carrier to convey passengers, nor do we deem it necessary to infer this [illegible] to consider the contention and statement of the attorney of appellee. It may be that she was absorbed in thought about other matters and not giving the proper attention to alighting from the car but this does not excuse her. While we are compelled to hold that the verdict of the jury is manifestly against the weight of the evidence, yet we are not inclined to reverse with a finding of facts.

The judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

****

(Not to be reported in full)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1944.*

Clerk of the Appellate Court.

OPINION

Fee $ .....

er Term, 1913. No.
310 - 16709

DAVID G. GERAGHTY, Plaintiff in Error,	Error to Superior Court, Cook County.
vs.	
NATIONAL FIRE PROOFING COMPANY, Defendant in Error.	

188 I.A. 447

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The record for review is that of a second trial of a case, in the former trial of which a joint judgment was rendered against defendant in error and the William Grace Company. On appeal the judgment was reversed, with a finding of fact here in favor of the latter, and directions for a new trial as to the former. (See 157 Ill. App. pp. 308, 309.) The second trial resulted in a judgment for defendant in error. One of the grounds relied upon for reversing it is the giving of the following instruction:

> "If you believe from all the evidence in this case that the plaintiff's employer, the William Grace Company, was negligent in failing to exercise reasonable care in furnishing the plaintiff a reasonably safe place to work at the time of the accident, and that said negligence was the proximate cause of the injury complained of, then you should find the defendant, National Fire Proofing Company, not guilty."

Whether the William Grace Company was thus negligent in failing to furnish plaintiff a reasonably safe place to work at the time of the accident was the very issue raised and decided in its favor on the former appeal and, therefore, should have been regarded as res judicata in the second trial. (Payson v. Village of Milan, 16[illegible] Ill. App. 518, Griesbach v. People, [illegible] Ill. [illegible].) It was error, therefore, to call upon the jury to readjudicate that question in order to determine whether defendant in error was guilty of the negligence charged against it.

It was also error to direct a verdict without regard

to whether defendant in error was guilty of negligence; for it was to determine that question that the evidence was submitted to the jury, and the instruction requires them to ignore it. Defendant in error may have been concurrently negligent even if the proximate cause of the injury was the negligence of the William Grace Company. (Smith v. Commonwealth Elec. Co., 241 Ill. 252, McGary v. West Chicago St. R. R. Co., 85 Ill. App. 610.) The error in giving this instruction requires us to reverse the judgment and remand the case for a new trial.

Another instruction improperly singles out one fact in the chain of evidence for the consideration of the jury. Whether any of the other points urged for reversal constitute error we deem doubtful, but we need not review them as they are not likely to arise on another trial.

REVERSED AND REMANDED.

r Term, 1913. No.
316 - 19715

THE CITY OF CHICAGO,
Defendant in Error,

vs.

CHARLES MURPHY,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

188 I.A. 449

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted in the Municipal Court of Chicago on the charge of being connected with the management and operation of premises in the city of Chicago kept for the purpose of permitting persons to gamble in violation of an ordinance of said city. The only proof of the venue was that the gambling took place at "3035 South State street," but of what city does not appear in the record. Whatever may be the rule elsewhere, the courts of this state will not take judicial notice that streets mentioned in the record are located in any particular city. (Dougherty v. The People, 118 Ill. 165, Cunning v. The People, 189 id. 165.) Nor does the record reveal any fact or circumstance showing by necessary inference that the place designated must be in the city of Chicago. For aught that appears, it may be in some other city. Proof that the act was committed in the city of Chicago was essential both to the jurisdiction of the court and the enforcement of the ordinance, and such proof was essential to a valid conviction. (People v. Lewis, 140 Ill. App. 493.) The judgment, having been rendered upon insufficient proof, must be reversed and the cause remanded.

REVERSED AND REMANDED.

er Term, 1910. No.

530 - 19728

MARGARET CAREY, Plaintiff in Error,	)	
vs.	)	Error to Superior Court, Cook County.
CHICAGO RAILWAYS COMPANY, Defendant in Error.	)	

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

One of the points assigned as error on this record is the modification by the court of an instruction tendered by plaintiff in error by substituting for the word "will" the word "may" in the final clause of the following instruction:

> "The court instructs the jury that it is the duty of plaintiff to prove her case by a preponderance or greater weight of the evidence, and if the jury believe that the evidence bearing upon the plaintiff's case, as laid in her declaration or any count thereof, preponderates in her favor, they <u>may</u> find the defendant guilty."

That a jury <u>should</u> find for the party that proves his case by a preponderance of the evidence is not a debatable proposition. The law makes it mandatory. To tell the jury they <u>may</u> so find is to convey the idea that it is discretionary, and is, therefore, misleading. To be sure, the word "may", as used in statutes or where public duty is involved, is often used in a mandatory sense, but otherwise it is generally used in a permissive or discretionary sense, and would be so understood by a jury.

The purpose of the instruction as offered was to direct a verdict for plaintiff if the jury found the evidence preponderated in her favor. In marked contrast with it as modified the jury were told by instructions given in behalf of defendant that if plaintiff has failed to prove certain matters by a pre-

ponderance of the evidence, she "cannot recover", and if the evidence did not preponderate in favor of plaintiff "or if it preponderated in favor of the defendant . . . then you are instructed to find the defendant not guilty." The jury should not have been left in the dubious position of exercising a discretion as to one party and following mandatory directions as to the other, with respect to the same subject. The instruction should have left no room for such discrimination and the ordinary jury would not make the refined distinctions drawn by defendant in error.

The verdict in such a case being mandatory, the word "shall" or "should" is the proper one to employ. The fact that there is much confusion in the ordinary use of the words "shall" and "will", gives little force to the criticism that the instruction, as tendered, improperly employed the term "will." The misleading character of the instruction is sufficient in itself to require us to reverse the judgment and remand the cause.

But another error assigned as to the rejection of certain evidence may arise on another trial. The gist of the action was a wanton and malicious assault by defendant's conductor in ejecting plaintiff from its car. Plaintiff swore that she gave the conductor a transfer. In this she was corroborated by the testimony of another passenger who also swore that she told the conductor before ejecting plaintiff that she had paid her fare. But the testimony of plaintiff, that said passenger so told the conductor, was stricken out as hearsay evidence. If she did not pay her fare, then he could, without using unnecessary force, rightfully eject her. But if she did pay her fare, the act was wrongful, and any information the conductor had before so ejecting her that she had paid her fare was material and direct evidence bearing on the question of malice and the character of his subsequent conduct. The court, therefore,

erred in striking out such testimony. While it is doubtful whether any other assignment is well taken, the judgment will be reversed and the case remanded for the reasons stated.

REVERSED AND REMANDED.

er Term, 1913 B.

340 - 19749

WILLIAM K. NOBLE, doing business as WAYNE HOOP COMPANY, Appellee,	)	
vs.	)	Appeal from Municipal Court of Chicago.
CHARLES A. WATSON, REGINALD A. WATSON and HAROLD B. WATSON, copartners doing business as C. A. WATSON & CO., Appellants.	)	

188 I.A. 451

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee, a manufacturer of barrel hoops at Fort Wayne, Indiana, doing business in the name of Wayne Hoop Company, sued appellants for the purchase price of a carload of hoops shipped to the latter at Savannah, Missouri. Appellants did not deny liability therefor, but filed a set-off for damages in delaying delivery. By agreement between them, the claim of appellee was adjusted and the case heard on appellants' claim of set-off as if on an independent action therefor. Appellants therefore assumed the burden of proof and at the close of their case the court, on motion therefor, directed a verdict for appellee. The only question presented is whether the court was justified in so doing.

The contention of appellants was that there was evidence tending to show a complete oral agreement between the parties and damages for a breach thereof, and appellee's contention was that the oral agreement was merged in a subsequent written agreement, as to which there was no proof of damages.

The record shows that Reginald A. Watson, one of appellants, testified that the dealings began by conversations over the telephone with one Milliken, appellee's agent, about August 15, 1910; that in a conversation on August 31st the latter expressly promised and agreed to have a car containing 60,000 hoops rolling

by September 2nd and delivered at Savannah, Mo., by September 5, 1910, without fail, at the price of $10.25 per thousand, and that thereupon Watson said: "You can take the order and I will wire you tomorrow so that you will have something to show for this order." Accordingly, the next morning he sent appellee the following telegram:

> "Ship Savannah, Mo., car to be rolling night of September second sixty thousand number one elm hoops six feet.
>
> C. A. Watson & Co."

and wrote appellee a letter saying:

> "This confirms our wire this date instructing you to load car 60,000 No. 1 elm hoops 6 ft., to be billed to ourselves Savannah, Mo. Car to be loaded and rolling Friday night, Sept. 2, 1910. Price to be as per your quotation $10.25 per M. F. O. B. above destination, terms to be 30 days net. We may want part of this car at Amazonia with a stop off at Savannah to partly unload. Then if we wish all car to Savannah can unload same there. Kindly forward B. L. to us promptly so that we can trace to destination and you also trace as we are waiting for stock and if same is satisfactory you will hear from us with further business. In haste,
>
> C. A.W. & Co., R. A. Watson."

A letter of same date, answering said telegram and signed "Wayne Hoop Co.," was as follows:

> "In line with your telegram of even date we enter your order for carload of 60,000 - 6 - 0" hoops to be shipped Savannah, Mo., which we will let go forward either Saturday or Monday. If we can get them out tomorrow, will certainly do so, but hardly think our mill will be able to get them out.
>
> After the car leaves our mill, we will have it followed with a wire tracer, and have it rushed through to you without further delay."

On September 2nd, appellee replied to appellants' letter as follows:

> "We have your favor confirming your telegram of even date. We wrote you yesterday, acknowledging receipt of your order, which we wired you we could get on the way either Saturday or Monday of next week. We note you want us to bill this shipment to you at Amazonia, Mo., with a stop off at Savannah, and have taken this matter up with our mill to do this. It is a little doubtful whether they will allow us to do this, as the western railroads as a rule do not allow stop offs.
>
> Our traffic manager has not rate to Amazonia, Mo., and we presume it takes St. Joseph rate of freight. If not, we will expect you to stand all over this.
>
> Yours truly,
>
> Wayne Hoop Co."

After receiving the two letters from appellee, appellants wired on September 8th: "Just arrived Chicago. Note

letter second. Is car rolling? Send number and routing," and on September 8th: "Why don't you give us car number routing car hoops. Must have car at once to prevent serious damage."

Other correspondence was introduced in evidence not material to the consideration of the questions before us.

No evidence was offered in behalf of appellee, and we think the record supports the inference that when appellee wrote the letters of September 1st and 2nd, saying that carload would go forward on Saturday or Monday (the 3rd or 5th), either he did not know his agent had made an oral agreement the day before that was to be confirmed by said telegram, or he sought a modification thereof as to the time the car should go forward, which would delay delivery from one to three days. So far as the question before us is concerned, it is immaterial whether appellants assented to the modification or not, if there was a complete and binding oral agreement.

From a careful examination of the record we think, therefore, the evidence tends to show a complete oral contract made by telephone with appellee's manager on August 31, 1910, to deliver them by September 5th a carload of hoops, containing 50,000, at $10.25 per thousand, at Savannah, Mo., and that the letter and telegram of September 1st were intended merely to confirm such agreement.

Appellee urges that appellants' telegram and letter constitute an abrogation of the oral agreement if entered into, but later in his brief argues that at no point in the transaction was there an offer by one party that was met in every respect by the acceptance of the other. If the latter contention is well taken, the former cannot be.

Said telegram and letter are not necessarily inconsistent with the oral agreement testified to. In fact, together they are capable of being construed as a confirmation of it, accompanied with

a mere request for a change of destination as to part of the goods, with which appellee expressed a willingness to comply if practicable, and there is nothing to indicate that acceptance of the hops depended on compliance with the request. It was, therefore, an important question of fact for submission to the jury whether there was such an oral agreement.

It is urged that the telephone conversation on August 31st was merely a tentative agreement, but unless the subsequent communications clearly negative the positive testimony of a complete oral contract, it remained an open question of fact for the jury to determine, when the court directed the verdict, whether such oral agreement was entered into.

Nor can we agree with appellee's contention that the evidence furnished no basis for the computation of damages. The court should have put appellee to his defense, and if he refused to make any, have submitted the case to the jury.

REVERSED AND REMANDED.

r term, 1910. No.

399 - 19801

J. A. SHEWBRIDGE, alias J. A. Streabridge, Appellee,	)	
vs.	)	Appeal from Superior Court, Cook County.
CHICAGO CITY RAILWAY COMPANY, Appellant.	)	

188 I.A. 454

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $3000 in an action for personal injuries resulting to a passenger on defendant's car from a collision between it and a horse and wagon at the intersection of Princeton avenue and 55th street, while the car was going west on the former and the team north on the latter. The accident happened after dark, about 7:30 p. m., December 24, 1910.

The action is grounded on the claim of negligence by the motorman in approaching the crossing, (1) in propelling the car at too great speed; (2) in failing to keep a proper lookout, (3) in not having the car under proper control; (4) in failing to sound the gong. While it is doubtful whether there was sufficient testimony to support either of the last two contentions, there was evidence tending to establish, directly or by inference, one or both of the first two contentions, so as to require submission of the case to the jury; and, while it is contended that the verdict is against the manifest weight of the evidence, we have reviewed it with the conclusion that we would not be warranted in disturbing it on that ground. The rate of speed was a controverted fact, which, together with the circumstances of the accident, including time and place, fairly presented issues for the jury's determination, and the verdict should stand unless complaint that it is ex-

cessive in amount, or that there was prejudicial error, is well taken.

It is urged that plaintiff's injuries are not permanent and that as he received his wages during the period of disability, the verdict and judgment are excessive. Plaintiff was rendered unconscious and received a fracture of the skull, necessitating the removal of a portion thereof which left a depression about one-third of an inch deep and two inches long where the brain is now apparently covered by connective tissue and cartilage only. This condition is unquestionably permanent, and headaches and dizziness have continued to the present time, and for about a year pains in his head were continuous. Under such conditions and consequent suffering, we cannot say that the judgment should be disturbed because of its amount.

We pass, therefore, to the claims of prejudicial error.

Plaintiff's counsel called the driver of the wagon to the witness-stand, and after asking merely his name and address, announced that he had no further questions to ask him. It is contended that this amounted to an open and unfair challenge before the jury that appellant proceed to examine the man it blamed for the accident. The record shows some colloquy and legal sparring between counsel for advantage from the incident, and the final dismissal of the witness without further examination, counsel for appellant saying, "We will let the jury hear from us both on that," and not calling upon the court for any ruling relating thereto. While the court might have appropriately rebuked such proceeding, which tended to convert the trial into a mere game, yet appellant is in no position to urge as error that of which it made no complaint below, but which, on the contrary, its counsel sought to use for its own advantage.

Complaint is made of refusal to give the following instruction:

"1. "The law does not regulate the precise rate of speed at which a street car must be run under any given circumstances, nor does it require that street cars be run at such a low rate of speed that would prevent the practical operation of the railroad's business as a public carrier of passengers. There is no law limiting the rate of speed to any given number of miles. The law only requires that those operating the car exercise towards passengers the highest degree of practicable care, as defined by these instructions, and if you believe from the evidence, and under the instructions, that the rate of speed at which the car was being run at the time and place of the accident was, under the circumstances in evidence in this case, not inconsistent with the exercise of the highest degree of practicable care as defined herein, on the part of those in charge of the car, then no negligence can be chargeable to the defendant in the operation of the car on the ground of the speed at which it was running."

It is contended by appellee that such instruction violates the rule against singling out and directing the jury's attention to one of a series of facts,- that relating to the car's speed. We hardly think it amenable to this criticism as it distinctly directs consideration of the evidence on that point with the other circumstances in evidence in the case. But, we think no prejudicial error resulted from refusal to give it. No contention was made that defendant was limited to any particular speed and the jury were told in another instruction that the exercise of the highest degree of care by defendant did not require it to run its cars with such a degree of care and caution as would prevent practical operation of its business, and that if the accident could not have been prevented, except by the exercise of such care and caution as would prevent such practical operation, then the jury should find for defendant. We think the latter instruction included all that was material in the one refused.

The other instruction re used, of which appellant complains, was subject to the criticism of leaving the jury to determine for itself from the declaration and without any other instruction on the subject to guide them, what were the material points of the case. This form of instruction has frequently been con-

demned (Baker & Reddick v. Summers, 201 Ill. 57; Casey v. Chicago City Ry. Co., 237 id. 146.) While, as appellant argues, another instruction given for plaintiff directed a verdict on the finding of certain facts which really constituted the material issues of the case, yet the jury were not so told. What were the material allegations of the declaration and issues of the case, were questions of law, which the instruction erroneously left the jury to determine for themselves. (Baker & Reddick v. Summers, supra.)

Prejudicial error is also claimed in instructing the jury that in determining the amount of damages they should consider evidence of "future suffering and loss of health," etc., appellant contending there was no evidence to justify consideration of such matters. As already stated, there was proof of the recurrence of pains in the head and dizziness up to the time of the trial. Their future continuance might well be inferred and deemed prejudicial to health.

It is also urged that there was error in giving the following instruction:

> "6. The court instructs the jury that it is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do under the circumstances, and in view of the character of the mode of conveyance adopted, and the practical operation of the road, reasonably to guard against accidents and consequential injuries, and if they neglect so to do, they are to be held strictly responsible for all consequences which directly flow from such neglect (provided such neglect and consequences is alleged in the declaration and established by the proofs); that while the carrier is not an insurer of the absolute safety of the passenger, it does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passengers and is responsible for the slightest neglect resulting in injury to the passenger (provided such neglect and injury is alleged in the declaration and established by the proof) if the passenger is, before and at the time of the injury, exercising ordinary care for his own safety."

The point made is that while the instruction has been approved on other grounds of criticism (Chicago St. Ry. Co. v. Shreve, 236 Ill. 539), it has not been considered with reference to the objection here raised that the last part of it (following

the semi-colon) omits to limit the degree of care to such as is consistent with the practical operation of the car line; that the instruction is practically the combining of two different instructions on the degree of care to be exercised by defendant, one of which is incorrect and, therefore, misleading. In view of the fact that another instruction was given, above referred to, explicitly embodying the limitation aforesaid, and that reference to the same limitation is again made in the first part of the instruction complained of, it is hardly probable that the jury separated the two parts of the instruction and, observing the failure to repeat the limitation in the second part, were misled or confused as to the extent of care to which defendant was held in law. If it were the only instruction on the subject, the criticism might possess some merit. As it is, it seems more or less hypercritical.

We do not think that there was such error as would justify a reversal of the case.

AFFIRMED.

er Term, 1913. No.

423 - 19826

ADVANCE AMUSEMENT CO., Appellee,	)	
	)	Appeal from
vs.	)	Municipal Court of Chicago.
FREDERICK H. FRANKE, Appellant.	)	

188 I.A. 457

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for plaintiff in a suit brought by it as lessee, to recover the sum of $3500 deposited by it with appellant, the lessor, pursuant to certain provisions of the lease entered into between them March 11, 1912, for a term ending February 28, 1917, at a rental of $350 per month. By reason of default and failure to pay rent for December and a portion of the rent for November, 1912, the lessor, after giving the statutory five days' notice, brought suit for possession of the premises, obtaining judgment therefor December 17, 1912. The judgment here appealed from was for the sum of said deposit, less the amount of rent that had accrued and remained unpaid to the date of the termination of the lease as aforesaid.

While there are several assignments of error, none are argued save the question whether the sum so deposited should be construed as liquidated damages or a penalty. Following the established practice, we shall consider this question alone, the other points raised by the assignments but not argued being waived.

It is true, as contended by appellant, that the intention of the parties must govern the construction to be placed upon the contract, but, as stated in Coble v. Linder, 76 Ill. 157, "it is the difficulty in ascertaining what was meant that has given rise to so many conflicting cases." Where, from the nature of the case and the tenor of the agreement, it is apparent that damages have already

been the subject of actual and fair calculation and adjustment, the damages being uncertainand not capable of being ascertained, they will usually be considered as liquidated (Gobble v. Linder, supra, 159), but when there is language in the contract indicating that the damages that may arise from its breach were not irrevocably fixed and settled by the parties, the inference, in harmony with the policy of the law against favoring forfeitures, would be against the conclusion that the declared sum was intended as liquidated damages, even though the parties so denominated it.

The language of the clause of the lease relied on by appellant is that in the event the lease shall be terminated by reason of a breach of the second party of any of its terms and conditions by him to be performed, "then and in such event the party of the first part may at his option retain as for and in full of liquidated damages the said sum," etc.

In Kay Gee Amusement Co. v. Cave, 177 Ill. App. 250, the use of the same language in a lease there under consideration was held to militate against the contention that the damages should be regarded as liquidated. Surely, the lessor's option so to regard them or not, thus giving the alternative to claim greater damages, is incompatible with the view that the parties have calculated and adjusted in advance the damages that may arise from breach of the contract, and inconsistent with the theory that their minds met in a mutual intention to that effect. We need not reiterate what was said upon that subject in the case above cited. We think its reasoning sound and conclusive of the question here raised. Regardless of any other language in the contract, which, taken by itself, might support a contrary conclusion, we think the reservation of said option requires us to construe the deposit in the nature of security, as it is designated in another part of the lease, and, therefore, as a penalty and not as liquidated damages.

The words, "at his option," cannot be ignored in gathering from all parts of the contract, as we must, the intention of the parties. If they intended the sum deposited to be liquidated damages, which, in their very essence, mean a fixed and settled sum agreed upon as the actual damages, these words, leaving it optional with the party suffering the damages so to regard them or not, would have no significance whatever. Without them, we might readily adopt appellant's construction and deem pertinent the authorities he relies upon. In none of the cases cited by him, however, did the contract under consideration contain these words or any similar reservation or condition. In each of them the agreement as to liquidated damages was clear, explicit and unconditional. The case of Pinkney v. Weaver, 216 Ill. 185, cited by appellant, is not in point. There the contract made it optional with the vendor of real estate to forfeit and determine the contract, but retention of payments made thereunder as liquidated damages was not optional.

We think the court below properly construed the deposit as a penalty. Whether the testimony warranted a larger deduction from the deposit as damages sustained, we need not consider as the point is not argued.

AFFIRMED.

tober Term, 1913. No.

443 - 19846

MARCUS SACHS, Appellee,	)	
vs.	)	Appeal from Municipal Court of Chicago.
CHARLES F. GIESENSCHLAG et al., on appeal of CHARLES F. GIESENSCHLAG, Appellant.	)	

188 I.A. 462

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

In a suit for an accounting between Marcus Sachs and Simon Sachs, copartners, a money decree in favor of the former was entered, and in default of payment thereof a receiver was appointed to hold the property until sold and disposed of under the orders of the court. An appeal by the latter from that decree having been dismissed, this suit was brought on the appeal bond, and this appeal brings up for review a judgment against one of the sureties, the appellant herein.

To the cause of action it was pleaded below that the receiver took possession of property belonging to Simon Sachs sufficient in value to pay the decree, costs and interest, and that said decree gave appellee herein a first lien thereon; and it is contended here that the possession of the receiver under such circumstances was a satisfaction sub modo the same as a levy by virtue of an execution on property sufficient to satisfy the judgment upon which it is issued.

The undertaking of appellant was not to pay the decree upon condition it should not be satisfied out of the property in the hands of the receiver, but that it should be void upon condition that Simon Sachs should prosecute his appeal with effect and pay the amount of the decree, costs, interest and damages rendered and to be

rendered against him in case said decree should be affirmed,-otherwise it was to remain in full force and effect. In the case of Mix et al. v. People, etc., 86 Ill. 329, a similiar defense to a suit upon a bond was interposed and the court said: "The parties, in all such cases, are bound by the terms of their contract - they must pay upon the occurrence of the contingencies upon which they agreed to pay." We think that case decisive of the question here involved.

Besides the damages and costs incurred on the appeal were not included in said accounting or the decree rendered thereon, and as to the recovery of their amount, the right of action on the bond would not in any event be suspended. Nor could appellee be required to split his cause of action. Needless to say, there could be but one satisfaction of the sum decreed to be paid, even if enough was realized from the property in the hands of the receiver for that purpose, and if satisfied by appellant, he, doubtless, could be subrogated to the debtor's right pro tanto to funds in the hands of the receiver.

Other reasons might be suggested why the position taken by appellant is untenable, but we need not discuss them for, unless the doctrine of satisfaction can be invoked, there was no defense to the action. It is unnecessary, therefore, to consider questions relating to the admission of evidence. The judgment will be affirmed, but we are not disposed, as requested by appellee, to view the appeal as prosecuted for delay.

AFFIRMED.

80604

POSTAL TELEGRAPH-CABLE COMPANY OF ILLINOIS, a corporation, Appellee,	Appeal from Circuit Court, Cook County.
vs.	
ROBERT STAEHLE, doing bus. etc., et al., Appellants.	

188 I.A. 464

MR. PRESIDING JUSTICE PARKES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order granting an injunction and denying the motion to dissolve the same. Pursuant to the prayer of the bill, it restrains defendants Staehle and his attorneys, Clark and Clark, from prosecuting pending suits and bringing further suits at law on assignments of wages made by complainant's employes, and from extorting or attempting to extort money from them.

In its material parts the bill avers that complainant employs a large force of skilled persons to whom defendant Staehle has made loans at exorbitant and usurious rates of interest on their individual notes secured by assignments of their wages earned and to be earned for a period of ten years, each with an annexed power of attorney to make certain waivers and confess judgment for the amount loaned with usury, attorneys' fees, etc.; that complainant has endeavored to comply with such assignments with the result that employes quit its service and its business was thereby injured; that it made an agreement with defendant Staehle for partial payments each month on certain of said loans but that Staehle disregarded the same, demanding payments in full and resorting to the courts for the enforcement of said assignments and his claims; that several suits based on

said assignments are pending against complainant and other suits are threatened, and that the other two defendants, his attorneys, are conspiring with his to bring such suits.

Connected with these averments are allegations in general terms, unsupported by averments of fact, that the assignments were procured by fraud, misrepresentation and duress, and that defendant Stasble has 'extorted' and is attempting to extort illegal sums of money and the wages of said employes.

In the absence, however, of any averments of fact to support the pleader's conclusions as to misrepresentation, fraud, duress, extortion or conspiracy, the bill sets forth nothing that is illegal in the transactions except usury, the only penalty for which is forfeiture of interest, (Bond v. Fursell Co., 86 C. C. A. 546) and which is available as a defense so long as any portion of the debt remains unpaid. (Mason v. Pierce, 14? Ill. 131.)

It is admitted in the argument for appellee that bona fide assignments of wages are not illegal in this state, and that the purpose of the bill is not to prevent defendant Stasble from loaning money or even from receiving usury or the assignments of wages as security for loans, but to prevent the use of such assignments to extort money from complainant or its employes to the injury of complainant's business. In the absence of essential averments of fact as aforesaid it must be inferred that the pleader regards the assertion of defendant's legal rights under the assignments as constituting extortion and conspiracy. If the loans are legal and the assignments valid, the mere fact that complainant's business is or may be injured by the enforcement of such assignments presents no case for equitable relief.

Nor can complainant, at least without having tendered the amount justly due defendant, create a case for equitable relief by paying employes their wages after receiving notice of their assignment. No equity arises from the mere fact that the

assignors will leave its employ in case it recognizes the binding force of such assignments.

Nor does payment to the assignors under such circumstances present a case of subrogation as contended for. The assignors are legally liable for the amounts of their loans and bound by their assignments, (Independent Credit Co. v. So. Chi. C. Ry. Co., 121 Ill. App. 595) and if complainant wilfully disregards their effect, it is difficult to understand how it thereby acquires the right of subrogation.

But, to give color to a right for equitable relief, complainant claims a right to discovery and an accounting. Its right thereto is predicated upon the claim that it has no means of knowing the number and amount of such assignments, and that it has paid its employes wages so assigned in order to retain their services and to prevent defendant using such assignments "to extort money to which he is not entitled." But it is not liable on any assignment of which it has received no notice before payment, and, in the absence of any allegation in the bill of its inability to acquire such information either from its employes or said Stashle, or that they have refused to give it, no case for a discovery is shown even if complainant is otherwise in position to assert such a right. As before stated, there are no facts alleged to support the charge of extortion or any defense to Stashle's claims not available at law.

Nor does the bill allege facts tending to show, as claimed, that the assignors were not chargeable with knowledge and the effect of the written instruments they executed, or facts constituting a conspiracy to injure complainant's business.

To the further contention of equitable jurisdiction to prevent a multiplicity of suits, it is enough to say that the only suits that can be brought against complainant are upon such

assignments. No one suit could settle any controversy of fact or law in the others. On the theory of avoiding a multiplicity of suits, complainant seeks to adjust in one suit by an accounting the several rights of action which it has voluntarily invited against itself by disregarding notices of what it admits were legal assignments, and as to which anything in the bill constituting a defense would be available at law. The bill sets up no facts that confer on it an actionable interest or that authorize it to come into equity and litigate for its employes, singly or collectively, the question of what is due from them on their several transactions with defendant Staehle. No irreparable injury or legal liability of defendants therefor, or other recognized grounds for an injunction are disclosed in the bill.

The injunction was granted on the reading of a bill, essential allegations in which are verified on information and belief. It has been frequently held that in such a case a preliminary injunction will not be granted. (See Schroth v. Siegfried, 162 Ill. App. 595, and cases there cited.) The motion to dissolve the injunction should have been granted.

REVERSED.

cer Term, 1913. No.
388 - 10789

CHARLES A. BUTLER, Appellant, vs. GEORGE KIRBY and HELENA C. KIRBY, Appellees.	Appeal from Circuit Court, Cook County.

188 I.A. 481

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 8, 1913, Charles A. Butler filed his bill of complaint in the Circuit Court of Cook County against George Kirby, Helena C. Kirby (wife of George Kirby) and William Muhlenfeld, defendants. The bill alleged, inter alia, that on November 13, 1912, Butler recovered a judgment in the Municipal Court of Chicago against said George Kirby in the sum of $1:56.59, upon which execution was issued and returned unsatisfied; that previous to the rendition of said judgment George Kirby was the owner of an undivided one-half interest, as joint tenant with said Helena C. Kirby, in certain premises in Cook County, that on February 2, 1912, previous to the rendition of said judgment but after the indebtedness upon which the same was rendered had accrued, Helena C. Kirby and George Kirby, with the intention of defrauding complainant and other creditors of George Kirby out of their just demands, conveyed said premises to said William Muhlenfeld for the consideration of $10, and that on the same day said Muhlenfeld conveyed the premises for a like consideration to said Helena C. Kirby. The bill prayed, inter alia, that as to the complainant said conveyances be set aside and declared null and void. The defendants, George Kirby and Helena C. Kirby, filed their joint and several answer, denying that complainant was entitled to the relief sought, and subsequently the case

was heard by the chancellorin open court, resulting in the entry of a decree dismissing the bill for want of equity, from which decree this appeal is prosecuted.

It appears that on January 4, 1911, the defendant, Helena C. Kirby (then Helena C. Adamick) was married to said defendant, George Kirby; that at the time of said marriage she was the owner in her own right of cash and securities of the value of more than $10,000; that in May, 1911, she purchased the premises in question, paying therefor with her own money the sum of $6000 in cash and assuming an existing mortgage thereon of $10,000; that at the earnest solicitation of George Kirby the deed to said premises was made to Helena C. Kirby and George Kirby, as joint tenants; that on February 8, 1912, Helena C. Kirby insisted that, as the property belonged to her, she be given the exclusive legal title therein, and that on said date the deeds to Muhlenfeld and from Muhlenfeld to her were executed and recorded.

We have reviewed the evidence heard by the chancellor, as contained in the transcript before us, and are of the opinion that the court was fully warranted in dismissing the bill for want of equity. The conveyances of February 8, 1912, which are sought to be set aside as being fraudulent as to complainant, were made more than nine months prior to the date that complainant obtained his judgment against George Kirby. Mrs. Kirby testified that she first learned of complainant's judgment against her husband shortly after its rendition, and that the first she knew "about Mr. Kirby owing Mr. Butler anything was about the first of May, 1912, when a colored man came with some papers for Mr. Kirby." And in the entire record we fail to find any indications of fraud on the part of Mrs. Kirby, or anything said or done by her inviting complainant to trust Mr.

Kirby upon the supposition that he had any interest in the premises in question. As said in Seeders v. Allen, 98 Ill. 468, 471: "She was in equity the owner, and her equitable title was by these deeds properly converted into a legal title, and this before any lien was established against the legal title in the hands of her husband. Her equity was first in time, and therefore first in right, and was first consummated. * * * The land was equitably her own, and as between her and creditors of her husband she was equitably entitled to it."

The decree of the Circuit Court is affirmed.

AFFIRMED.

HENRY FRIEDMAN, Appellee, vs. NORTHWESTERN TERRA COTTA CO., a corporation, Appellant.	Appeal from Circuit Court, Cook County.

STATEMENT OF THE CASE. This is an appeal from a judgment for $38,836.14, rendered in an action of assumpsit by the Circuit Court of Cook County, in favor of Henry Friedman, plaintiff, against Northwestern Terra Cotta Co., a corporation, defendant.

Plaintiff's declaration consisted of the common counts and two special counts, to which the defendant filed a plea of the general issue. The first special count alleged, in substance, that on January 1, 1911, the defendant was in the business of manufacturing and selling terra cotta for building and construction purposes in the city of Chicago; that the defendant then and there made a contract with plaintiff whereby plaintiff agreed to work for defendant, take charge of its cost-keeping and estimating department and devote all of his time and energy in securing contracts for the sale of terra cotta products; that for said services defendant agreed to pay plaintiff the sum of $5,000 for the year ending December 31, 1911, and the further sum of 4% "commission" upon all sales of said terra cotta products that plaintiff might make during said year; that plaintiff faithfully performed his part of the contract and during said year secured for defendant from divers persons and corporations contracts for the sale of, and sold, large amounts of said products, to-wit: $1,000,000 worth; that on January 1, 1912, plaintiff became entitled to the sum of $40,000, as "commission" on said sales, in addition to said sum of $5,000; that the defendant paid to plaintiff the total sum of

$5,302.86, and that there remains due and owing to plaintiff the sum of $39,887.14, which sum defendant has not paid and still refuses to pay, to the damage of plaintiff, etc. The second special count is substantially the same as the first, save that it enumerates in detail the names of the parties and the contract price in each of the several contracts which plaintiff alleges he made for the defendant during said year.

The case was tried before a jury. Only three witnesses were sworn and examined,- the plaintiff, and the president, Gustav Hottinger, and the vice-president, Fritz Wagner, of the defendant corporation. The facts as disclosed from the testimony of said witnesses are substantially as follows: The defendant corporation is engaged in the city of Chicago, and it and its predecessors have there been engaged for over thirty years, in the business of manufacturing and selling terra cotta and terra cotta products for building purposes. Plaintiff entered the employ of defendant's predecessor in 1885, and continued in defendant's employ until January 15, 1913, when he resigned his position. From 1895 on he had charge of the cost-keeping and estimating department of defendant's business, and from 1909 he received a salary of $5,000 per year. Since 1907, the business of defendant has been managed by the vice-president, Wagner, in consultation with the president, Hottinger, except when Wagner was absent on a vacation, at which times Hottinger acted as manager. The defendant had soliciting agents in many cities of the central and western states who received a certain commission on contracts procured by them, and when there was competition and the agent succeeded in getting the customer to give a preference to the defendant he received a larger commission. Usually no soliciting agents were employed in Chicago, and when Chicago architects or contractors desired terra cotta work to be made for buildings in Chicago or elsewhere they would generally write or telephone defendant asking for bids, and from the

records kept in the estimating department Wagner, or in his absence Hottinger, would name a price for which defendant would do the work desired. In the year 1910 plaintiff requested that he become a stockholder and officer of the company, but he did not ask for an increase in salary. Wagner, in reply, did not make any definite promise as to plaintiff becoming a stockholder and officer, but said he would at the end of the year (1910) figure out and pay to plaintiff and others, as a bonus, a "percentage of the profits" of the business, if any. Wagner did not, however, state what that percentage would be. During the year 1910 the defendant permitted plaintiff to draw against his salary as he might elect, and in the month of October plaintiff had drawn out all of his $5,000 salary for that year. In December, 1910, plaintiff asked Wagner if there was enough coming to him so that he might have $3,500, and Wagner, after consulting Hottinger, gave plaintiff his (Wagner's) personal check for $3,500. Early in 1911, after the profits for the year 1910 had been ascertained, Wagner and Hottinger agreed upon the percentage which they would allow to plaintiff and certain other employees. Plaintiff, however, was not informed what that percentage was. The defendant company turned over to Wagner the entire amount to be distributed to said employees, and Wagner deposited the same in his own bank account and gave his personal check to the several employees. The amount so turned over to Wagner was charged on defendant's books as "commissions." This method of procedure appears to have been for the purpose of withholding all knowledge of the payment of any percentage to said employees from other employees. The amount coming to plaintiff was figured at $4,198.24, and Wagner gave plaintiff his personal check, dated March 9, 1911, for said amount less $3,500, viz: $1,698.24, which check plaintiff accepted. During the latter part of the year 1910, and during the year 1911, the competition in the terra cotta business in Chicago had become much keener than

As to the facts as above outlined there appears to be no substantial dispute. The real issue in the case is whether the defendant verbally contracted to give plaintiff, for his services during the year 1911, in addition to his salary of $5,000, a certain "commission" on sales made by him, or a "percentage of the profits" of the business, as a bonus. And on this issue the testimony is conflicting. Plaintiff testified, in substance, that in October, 1910, Wagner informed him that a certain competitor from the East had entered the Chicago market and was cutting prices, and instructed him to go out and get the work away from said competitor, and told him that prices would not cut any figure and that plaintiff would get "as good commissions as any other agent"; that other agents working outside of the city of Chicago received a commission of 5% on contracts procured up to $5,000, and 3% on the excess; that plaintiff during the months of October, November and December, 1910, was instrumental in closing several contracts, aggregating about $200,000, for work to be done on buildings to be erected in the year 1911; that during 1911 he was instrumental in closing contracts for work aggregating practically $1,000,000; that during that year he several times protested to Wagner at the low prices at which work was being taken, and that at each time Wagner told him to go ahead and get the work and that the fact of the low prices would not militate against plaintiff receiving his commissions; and that he resigned his position in January, 1912, because of the refusal of defendant to give him a stock interest and elect him an officer of the company. Both Wagner and Hottinger denied that they had at any time agreed to give plaintiff, in addition to his salary, any "commission" on contracts which plaintiff might be instrumental in securing. Wagner testified that occasionally, prior to October, 1910, plaintiff had been sent out to assist in securing contracts; that afterwards he was sent out more frequently; that when sent out he was instructed by

Wagner as to what prices he should make; and that he was not permitted to solicit work or submit bids on his own initiative.

The letter of December 30, 1912, above referred to and which was refused admission on the ground that it was an offer to compromise, is as follows:

"Mr. Henry Friedman has called on me in relation to a claim for bonus promised him on contracts closed by him for your company during the year 1911. It is Mr. Friedman's contention that although a bonus was promised him based on earnings on contracts secured by him, that after he resigned his connection with your company that you advised him that the company had made no money during 1911, and consequently a very nominal bonus was paid. During the year 1910 when Mr. Friedman succeeded in closing only a few contracts a considerable bonus was paid to him, and consequently he continued during 1911 with your company and redoubled his efforts, anticipating a fair remuneration for the same. Your president, Mr. Hottinger, also held out hopes to Mr. Friedman that he would be more closely associated with your company in an official capacity and would be liberally rewarded at the end of the year on certain good contracts closed in which Mr. Friedman succeeded in obtaining preference and by helping to eliminate from this field certain other contracting companies.

"Is it not possible to amicably adjust this matter without filing a bill in chancery to compel an accounting? Kindly advise me.

Yours very truly,
GEO. D. WELLINGTON."

When the jury retired to consider their verdict on the afternoon of June 3, 1913, the attorneys for the respective parties agreed that they might seal their verdict and separate until the usual hour on the following morning. When the court convened, as appears from the bill of exceptions, the foreman of the jury handed in the verdict and stated that the jurors could not remember the exact amount of plaintiff's claim, and, in order not to make a mistake, they had returned a verdict "for the full amount of plaintiff's claim," whereupon the court instructed the clerk to read the verdict, which was signed by all jurors and which was as follows: "We, the jury, find the issues for the plaintiff, and assess plaintiff's damages at the sum of, full amount of claim, ... dollars." After considerable discussion, indulged in by the attorneys and the court in the presence of the jury, the court, over the objection and exception of the defendant, gave to

the jury the following instruction:

> "The court instructs the jury that the amount claimed by the plaintiff as due from him, the defendant, is $36,536.14, and it is claimed by the defendant that neither said sum nor any part thereof is due the plaintiff from the defendant. By the giving of this instruction the court does not intimate or wish to be understood as giving any opinion one way or the other as to whether the plaintiff is entitled to an allowance of said amount claimed or any other amount from the defendant, or that there is or is not due to the plaintiff any amount from the defendant, or that you should find the issues joined in favor of the plaintiff or in favor of the defendant. It is solely and exclusively for the jury to determine the facts, and this they must do from the evidence, and having done so, then apply to the facts the law as stated in the instructions of the court."

The jury again retired and subsequently returned a verdict, as follows: "We, the jury, find the issues for the plaintiff and assess plaintiff's damages at the sum of $36,536.14," to the receipt of which verdict by the court the defendant objected and moved for a new trial, which motion the court denied and entered judgment on the verdict.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Counsel for defendant urge in this court that the judgment should be reversed because (1) the verdict is manifestly against the preponderance of the evidence, (2) the court erred in refusing to admit in evidence the letter, dated December 30, 1913, written to defendant by Mr. Wellington, the attorney for plaintiff, and (3) the court erred in giving to the jury the instruction mentioned in the foregoing statement of the case. Inasmuch as we have reached the conclusion that the judgment should be reversed and a new trial had, we will not express any opinion as to counsel's first point.

As to the letter, we are of the opinion that the trial court erred in refusing to admit the same in evidence. It appears that plaintiff, after advising his attorney, Mr. Wellington, of

the facts regarding his claim against defendant, expressly authorized the writing of the letter, and it was offered in evidence by defendant as tending to impeach certain of the statements of plaintiff made upon the stand to the effect that defendant had verbally agreed to give him certain commissions on sales, as distinguished from a certain bonus on the earnings of defendant. The court refused to admit the letter on the ground that it "has to do with a compromise and a settlement." We think that under all the facts and circumstances the court's refusal constituted error prejudicial to the defendant. And we do not think that the letter was inadmissible on the ground stated. The last paragraph of the letter was a mere suggestion that possibly there might be an amicable adjustment of plaintiff's claim. It contained no offer to compromise, and no statement that plaintiff would be willing to make any concession. In Thompson v. Austen, 2 Dowl. & Ryland 358, 360, it is said: "The essence of an offer to compromise is, that the party making that offer is willing to submit to a sacrifice, and to make a concession." In 1 Greenleaf on Evidence, sec. 192, it is said: "In order to exclude distinct admissions of facts, it must appear either that they were expressly made without prejudice, or, at least, that they were made under the faith of a pending treaty, and into which the party might have been led by the confidence of a compromise taking place." (See also Hartford Bridge Co. v. Granger, 4 Conn. 142, 148.)

In view of the foregoing it will be unnecessary for us to express an opinion on the third point urged by counsel for defendant. The situation will doubtless not arise on another trial.

For the reasons indicated the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED & REMANDED.

Term, 1913. No.
435 - 19838

FREDERICK W. JOB and DUDLEY TAYLOR, Appellees, vs. HENRY M. WALLACE, Appellant.	Appeal from Municipal Court of Chicago.

188 I.A. 485

STATEMENT OF THE CASE. This is an appeal from a judgment for $1,475, rendered by the Municipal Court of Chicago, in favor of Frederick W. Job and Dudley Taylor, plaintiffs, against Henry M. Wallace, defendant. The case was tried before a jury who returned a verdict finding the issues against the defendant and assessing plaintiffs' damages at $1,600. The court required a remittitur on the verdict of $125.

In plaintiffs' amended statement of claim it is alleged, in substance, that on or about January 3, 1899, at Chicago, the defendant employed plaintiffs to represent him as his attorneys in the matter of his relations with the Klondike-Yukon Copper River Mining Co., and the proposed formation by said defendant of a new company to carry on dredging work, gold mining, etc., along the rivers then controlled by said Klondike Co.; that it was then agreed that said legal services of plaintiffs would be rendered from time to time during a period of about 60 days thereafter; that defendant agreed to pay plaintiffs for said services in accordance with the terms of a certain written agreement (thereto attached and made a part of said statement of claim); that plaintiffs represented defendant in the matter of his relations with said Klondike Co., endeavored to procure an adjustment of said relations and a settlement of the claim of defendant against said Klondike Co., instituted suits at law and in equity in behalf of defendant against said Klondike Co. and certain of its officers,

appeared for and represented defendant in a suit instituted against him by said Klondike Co., rendered other legal services to defendant in relation to said suits and the matters in controversy, and fully complied with the terms of their employment during more than 60 days after January 3, 1899, and for a long time thereafter and until about March 17, 1900; that plaintiffs were able and willing to render services as to the proposed formation of said new company but said defendant decided not to form said new company and did not require plaintiffs' services in relation thereto; that defendant did not pay plaintiffs $100 or $1,000, and did not deliver to them $1,000 par value of capital stock, all as provided in said agreement; that defendant has not paid them any part of said $1,000, or delivered to them any capital stock, in payment for their said services, and that there is now due them from defendant the sum of $1,000, with interest at 5% per annum from January 3, 1901.

The written agreement mentioned is as follows:

"Chicago, January 3, 1899.

H. M. Wallace, Esq.,
Chicago, Ill.

Dear Sir:-

Referring to our consultation with you Saturday and today regarding legal services to be performed by us in the matter of your relations with the Klondike-Yukon Copper River Mining Co., and the proposed formation by you of a new company to carry on dredging work, gold mining, etc., in and along the rivers now being controlled by said Klondike Co., and referring to the matter of payment for legal services to be rendered you by us, we would say:

You are to pay us $100 in cash at the time a certain One Thousand ($1000) Dollars now contemplated to be collected by you is collected from Mr. and Mrs. D. Hunt of Ann Arbor; in any event said $100 to be paid not later than 60 days from today, and also to give us on account of our services $1000 par value of the capital stock of the new Klondike Mining Corporation, contemplated to be incorporated by you under the laws of West Virginia, as soon as may be expedient after or during the settlement of your differences with the first above named corporation; in any event said $1000 par value of capital stock is to be delivered by you to us on or before two years from this date; you are to further guarantee and do hereby guarantee to us that within two years from this day you will purchase from and pay us for said $1000 capital stock, the sum of $1000 (less the $100 hereinbefore mentioned) and we agree that at any time after the delivery to us of said stock, and before two years from today, you shall have the privilege of purchasing said $1000 capital stock from us for the sum of $1000. In the event that

said new corporation is not formed by you, or said stock is not delivered to us by you, you are to and do hereby agree to pay us the sum of $1000 in cash (less the said sum of $100 hereinbefore mentioned when the same is paid) on or before two years from this date.

Said sum of $100 and said $1000 capital stock so guaranteed by you is to be for services rendered by us as aforesaid; if no unusual amount of legal services are rendered by us in the matter of adjusting your differences with the first above named corporation, or the attack upon the same by a stockholder who is friendly to your interests, then said sum of $100, and said capital stock so guaranteed by you, or the cash in lieu thereof, shall be and become a full settlement of our services rendered.

If, however, any unusual amount of work is necessary or becomes necessary to be done by us in and about said matters, then we are to have the right to make a further charge to you for said services.

You are to furnish all moneys that may be or become necessary to cover actual costs and disbursements paid out and expended in and about the legal work contemplated herein.

You are to and do hereby agree to protect and indemnify us against any assessments or legal liability of any sort whatsoever that may be made upon or against the said $1000 capital stock to be given us by you.

DUDLEY TAYLOR
F. W. JOB

The terms of this Agreement accepted this Third day of January A. D. 1899.

H. M. WALLACE."

In defendant's affidavit of merits the nature of his defense was stated, as follows:

"That the plaintiffs agreed to file a bill for a receiver and to take the necessary steps to show the insolvency of the Klondike-Yukon Mining Co., and secure an adjudication winding up the affairs of said company within a period of thirty or sixty days. It was agreed by the plaintiffs to give precedence to this work over all other work in their office, that time was the essence of the contract; that the plaintiffs failed to take the necessary evidence for the securing of the proper orders; that they refused to give the matter the necessary attention, refused to give it precedence over matters in their office, failed to bring or to use reasonable effort to bring the matter to a final adjudication within sixty days as agreed; refused to appear in court or before master in chancery unless paid in advance for such appearance; that the bill filed by them was demurred to and they neglected to call up and dispose of said demurrer and finally dismissed their bill without securing any adjudication in the suit; that the plaintiffs wholly failed to perform their agreements and by reason thereof this defendant was put to great expense and loss of money and profit."

On the trial each of the plaintiffs was examined and cross-examined at length, and the agreement of January 3, 1899, sued on, was introduced. At the conclusion of plaintiffs' evidence the court denied the motion of the defendant for a directed

verdict. The defendant was the only witness in his own behalf. Certain letters and documents were also introduced. In rebuttal each of the plaintiffs again testified, and other letters were offered and received in evidence. At the close of all the evidence the motion of defendant for a directed verdict was renewed and again denied. The court instructed the jury orally.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is first contended by counsel for defendant that the motions for a directed verdict for the defendant, made at the close of plaintiffs' evidence and again at the close of all the evidence, should have been allowed, (1) because the evidence showed that plaintiffs repudiated their contract and abandoned their retainer, and were therefore entitled to recover, if anything, only the reasonable value of the services rendered, and (2) because the evidence showed that the contract upon which plaintiffs sued had for its consideration their agreement to commence groundless suits, which contract was contrary to public policy and void. After a careful examination of the transcript before us we cannot say that the evidence showed that plaintiffs repudiated their contract, or that the contract sued on had for its consideration the agreement of plaintiffs to commence groundless suits on behalf of defendant. Nor do we think that the verdict is manifestly against the weight of the evidence, as urged by counsel. In our opinion, the evidence tended to prove all of the allegations of plaintiffs' amended statement of claim.

It is also contended by counsel that error, prejudicial to the defendant, was committed by the court in certain portions of the oral charge to the jury and in the refusal to give to the jury certain written instructions offered by defendant. It is

argued that the court in effect told the jury that they could not consider what was said by the parties prior to the date of the contract of January 3, 1899, for the purpose of supplementing said contract. While it is true that the court in a somewhat lengthy charge told the jury that the terms of a written contract could not be changed by oral evidence, we do not think that the jury were misled. The court allowed both the plaintiffs and defendant to testify fully as to the conversations had between the parties prior to the signing of the contract. Furthermore, no specific objection was made to this portion of the charge by the defendant at the time. (Pecarero v. Halberg, 246 Ill. 95.) It is also argued that the court erred in charging the jury that if they found for the plaintiffs they should find plaintiffs' damages at the sum of $1,000, together with interest. We do not think that under the pleadings and the evidence the court erred in this portion of the charge. The suit was upon a specific contract. No attempt was made to recover upon a quantum meruit. Furthermore, no specific objection was made to this portion of the charge. As to the written instructions offered by the defendant and which the court refused to give, we are of the opinion that they were all properly refused. Several of them assumed as facts matters controverted by the evidence; others were misleading. Furthermore, it has been decided that, where a Municipal Court judge elects to instruct the jury orally, it is not error to refuse to give offered written instructions, even if they are correct and applicable to the facts of the case. (Morton v. Fusey, 237 Ill. 36; Hakes v. B. Aaron & Sons, 182 Ill.App. 100, 104.)

And we do not think that the trial court, in the rulings on evidence or in certain questions asked of the defendant, committed any errors warranting a reversal of the judgment.

Finding no reversible error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

CHARLES M. HOVEY, Appellee,
vs.
D. A. MATTESON, Appellant.

Appeal from Municipal Court of Chicago.

STATEMENT OF THE CASE. This is an appeal from a judgment for $1,193, entered upon the verdict of a jury by the Municipal Court of Chicago in favor of Charles M. Hovey, plaintiff, and against D. A. Matteson, defendant. Plaintiff sued for commissions claimed to be due him as a licensed real estate broker on the sale of a certain 15-flat building situated in the city of Chicago and owned by defendant. In his statement of claim plaintiff alleged, in substance, that on July 15, 1912, the defendant "listed" said building with plaintiff and "agreed thereby to pay the customary commission" in case plaintiff found a customer; that such customary commission is 2½ per cent.; that plaintiff found a customer, one Emanuel Leavitt, who purchased the property at the price of $47,500, and that, therefore, plaintiff claimed a commission of 2½ per cent. on the amount the property sold for. In defendant's affidavit of merits it was alleged, in substance, that plaintiff did not procure said Leavitt as a customer for defendant's building; that said building was exchanged for another building owned by said Leavitt, which latter building was of a value much less than $47,500; that another real estate broker, named Gripp, was the procuring cause of such exchange, and that plaintiff at the time was acting as a broker for said Leavitt.

It appears from the evidence that in April or May, 1912, the defendant saw C. A.E. Gripp, a licensed real estate broker, and informed him that he expected to soon acquire title to a certain

15-flat building in the city of Chicago, and requested Gripp to endeavor to sell or exchange the same. Subsequently, in July, 1912, defendant obtained a contract for the sale to him of said building, and about July 15th he met the plaintiff for the first time and also requested the latter to endeavor to sell or exchange said building. At this interview defendant mentioned $55,000 as the price for said building, but nothing was said regarding commissions. Subsequently, on July 29th, defendant received a deed to the building. Some time in June, 1912, Emanuel Leavitt listed his 9-flat building, on South Spaulding avenue, Chicago, with the plaintiff for sale or exchange. Later in the same month Leavitt also listed said 9-flat building with Gripp. On July 25th plaintiff wrote defendant to the effect that a party named Emanuel Leavitt was the owner of a 9-flat building and that he desired to trade his building for a larger flat building, being willing to pay the difference in price in cash. At this time plaintiff had an agreement with Leavitt that if plaintiff succeeded in selling or exchanging the Leavitt building he was to be paid the regular commission. Plaintiff, however, did not advise defendant of this fact, nor did he mention Leavitt's address or the location of said building. About August 3rd defendant telephoned plaintiff saying he had received plaintiff's letter of July 25th, and that if plaintiff thought that the party mentioned would be interested in a trade to get a proposition from him. In the meantime Gripp had noticed in a newspaper that defendant had acquired title to said 15-flat building,and about August 1st or 2nd he communicated with defendant, and the latter again told Gripp to endeavor to sell or exchange said building. On Sunday,August 4th,Gripp called at Leavitt's residence,met Leavitt and the latter's son,and submitted defendant's building to Leavitt, and on the same day telephoned defendant's residence and left a message with defendant's wife, which message defendant received that evening, to the effect that

he had a building on South Spaulding avenue which he wanted defendant to look at, and requested that defendant call at Gripp's office on the following morning. After Gripp had called at the Leavitt residence, Leavitt's son, Richard, on the same day called on plaintiff and asked if there was "anything new," and plaintiff stated that he was "getting a line" on defendant's building (giving its location), which he thought might be traded for the Leavitt building, to which Richard replied that that building had already been submitted by Gripp. After this interview and on the same day plaintiff wrote defendant a letter, dated August 4th, in which he for the first time gave defendant the location of the Leavitt building. The envelope containing this letter was postmarked "Aug. 5, 1.30 A. M." In this letter plaintiff wrote, in substance, that a man named Gripp had submitted defendant's building to his "client," Leavitt; that because he had only yesterday received defendant's reply by telephone to his (plaintiff's) letter of July 25th, he had not been able to previously present defendant's building to Leavitt, that "in case the other gentleman should see you or communicate with you, you will of course tell him that I had taken this matter up some time before he did," and that he hoped defendant would examine the Leavitt building immediately. On the morning of August 5th defendant called at Gripp's office and Gripp gave him the location of the Leavitt building and defendant went and examined the building, met Mrs. Leavitt, wife of Emanuel Leavitt, and then called on plaintiff. Defendant testified, in substance, that at this interview he told plaintiff that he had examined the Leavitt building; that another broker, Gripp, had first submitted the building to him; that Mrs. Leavitt had told him that the Leavitts would not deal with plaintiff because Gripp had submitted defendant's building to them first; that plaintiff then asked defendant if defendant would not give him a proposition for a trade which he (plaintiff) could submit to Leavitt; that defendant replied that

he would do so and that he would also give the same proposition to Gripp and that whichever of them consummated the trade would be paid a commission; that the proposition was that he wanted $15,000 and the Leavitt building for his (defendant's) equity in the 15-flat building; that defendant then went again to Gripp's office and made the same statement to him; that about a week thereafter defendant telephoned plaintiff and asked him what he had done with Leavitt, that plaintiff replied he had submitted defendant's proposition to Leavitt but that Leavitt had said that defendant wanted too much money for his building and that he (plaintiff) could not get a counter proposition from Leavitt; that he (defendant) did not again hear from plaintiff until after the contract of August 22nd was signed; and that when the deeds were subsequently passed defendant paid Gripp $800 as a commission and that Leavitt also paid Gripp $300 as a commission.

Gripp testified, in substance, that defendant called at his office twice on August 5th; that on the second call and after defendant had examined the Leavitt building defendant told him to submit a proposition to Leavitt that he would trade his building for the Leavitt building and $15,000; that Gripp told him that he thought the price a little high but that he would see what Leavitt would be willing to do; that on August 7th or 8th, at his solicitation Leavitt and defendant met in his (Gripp's) office and various propositions, back and forth, looking to a trade were made but no agreement was arrived at; and that subsequently he had various interviews with both Leavitt and defendant, which finally resulted in their entering into a contract, on August 22nd, for the exchange of their respective buildings.

This contract was introduced in evidence, and provided, in substance that Leavitt would pay to defendant $5,725 and deed to defendant said 9-flat building, valued at $25,000 and being unincumbered, in consideration of defendant and wife conveying to

Leavitt defendant's 15-flat building, valued at $47,725 and on which there was a mortgage of $17,000. The contract bore an endorsement over the signatures of the parties to the effect that said contract had been consummated on September 1, 1912, by the delivery of the deeds, payment of cash, etc.

The plaintiff, Hovey, testified that on Sunday, August 4th, after Richard Leavitt had called and advised him that Gripp had first submitted defendant's building to the Leavitts, he (plaintiff) tried to telephone defendant at the latter's residence, and later succeeded in telephoning him at his mother's residence; that he then informed defendant of Gripp having submitted defendant's building to the Leavitts, and that defendant replied to the effect that he (defendant) had told Gripp that he (Gripp) was too late as plaintiff had first submitted Leavitt's property to defendant; and that he (plaintiff) wrote the letter of August 4th to defendant after he had had this telephone conversation with the defendant. The defendant, Matteson, denied that he had any such telephone conversation with plaintiff or made any such statement to plaintiff. And in plaintiff's letter of August 4th there is contained the sentence, "I tried to get you on the telephone today, both at your house and at your mother's, but you were out, so I am writing you this letter." Plaintiff further testified, in substance, that after defendant had called at plaintiff's office, on August 5th, he did not see or communicate with either Leavitt or his son for three or four days; that then he saw Leavitt's son, Richard, and submitted to him defendant's proposition, viz: the Leavitt building and $15,000 for defendant's building as incumbered; that Richard said the $15,000 difference was too much, and that plaintiff so advised defendant by telephone, and that defendant suggested that plaintiff procure a counter proposition; that plaintiff again saw Richard and urged him to make a proposition, saying, "it is possible we can get his (defendant) down something from that," and that

he never got any proposition from the Leavitts.

While plaintiff was on the stand there was offered and received in evidence, over defendant's objection, a carbon copy of a letter, written by plaintiff to defendant on September 3rd, after the contract for the exchange of buildings had been signed and the deeds had in fact passed. Notice to produce the original was given and proof of mailing made. In this letter plaintiff stated that he had heard of the signing of said contract of August 22nd, gave a history of the dealings and relations of the parties as viewed by plaintiff, expressed surprise at the "clandestine" manner in which the negotiations between Gripp defendant and the Leavitts had been carried on, intimated that plaintiff was entitled to commissions on the deal and demanded an early interview.

At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence defendant moved for a directed verdict in his favor, but the motions were denied.

The court delivered a somewhat lengthy oral charge to the jury in which the court stated, among other things, that "if you find the issues for the plaintiff your verdict must be for $1,195," to which charge as to damages defendant objected. There was no evidence that when defendant listed his building with plaintiff, or at any time, defendant agreed to pay any definite sum as commissions in case plaintiff negotiated a sale or exchange. And there was no positive testimony as to the actual value of defendant's building. The only suggestion of any value was that contained in the contract of August 22nd, viz: that the parties agreed to exchange the buildings on the basis of trade values as follows: Leavitt agreed to convey his building, valued at $25,000, and pay $5,725 cash, in consideration of defendant conveying his building, valued at $47,725 but subject to an incumbrance of $17,000. The only testimony introduced as to the customary charges for commissions of brokers in Chicago in the year 1912 for selling or secur-

ing an exchange of real estate was that of the plaintiff, who testified that at the time and place such customary charge was 2½ per cent. He further testified that he had computed commissions at 2½ per cent. on a sale of $47,720 and it amounted to $1,193 and some cents.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for the defendant that the court erred (1) in admitting plaintiff's letter to defendant of September 3,1912, and (2) in charging the jury that if they found the issues for the plaintiff their verdict must be for the sum of $1,193. It is further contended (3) that the judgment should be reversed with a finding of fact, on the ground that the evidence shows that Gripp, and not plaintiff, was the procuring cause whereby the exchange of said buildings was made by Leavitt and the defendant.

In the view we take of this case it is perhaps unnecessary for us to discuss the two points of counsel,first mentioned. We may, however,say that in our opinion plaintiff's letter of September 3rd should not have been admitted and that its admission tended to prejudice the jury in favor of plaintiff. The letter was written after the exchange of the buildings had been consummated and after the rights of plaintiff, if any he had, had become fixed, and it was a self-serving document and apparently written in preparation of making a claim against defendant for commissions. And, in our opinion, the trial court also erred in giving that portion of the charge to the jury as to damages, wherein the jury were instructed that if they found the issues for the plaintiff their verdict must be for $1,193. The plaintiff testified that the cus-

tomary charges of brokers in Chicago for selling or exchanging real estate was 2½ per cent. and that 2½ per cent. on a sale of $47,750 amounted to some cents more than $1,193,but there was no testimony of the custom on what that rate was figured,whether on the actual or trade value of said real estate; and there was no testimony as to the custom when mortgaged property is exchanged, whether said rate is figured on the value of the property less the mortgage or not. The actual value of defendant's building was not shown. And the contract introduced in evidence discloses that the exchange was on the basis of certain trade values made by the parties to the contract, that the Leavitt building was valued at $25,000,that the net value of defendant's building was figured at $30,725, and that Leavitt was to pay defendant the difference, $5,725, in cash. In 19 Cyc. 237, it is said: "In estimating the commission upon an exchange of real estate the actual and not the trade value of the property should be taken as the basis." And see Calland v. Trapet,70 Ill. App. 228.

As to counsel's third point, we are of the opinion, after a careful examination of the transcript before us, that the evidence clearly shows that plaintiff was not the procuring cause whereby the agreement to exchange and the exchange of said buildings were made by Emanuel Leavitt and defendant. In Friend v. Triggs Company, 147 Ill. App. 427, 430, it is said, quoting from Day v. Porter, 161 Ill. 235, 237: "A broker, unless wrongfully prevented by his principal, must bring about an agreement in order to be entitled to his commission, and the principal may employ several brokers to sell the same property, and may sell to the buyer who is first procured by any of them, without being called upon to decide which of the brokers was the primary cause of the sale provided he remains neutral between them and is not guilty of any wrong." In this case the evidence shows that the defendant listed his 15-flat building for sale or exchange with both the

broker, Gripp, and the plaintiff; that Gripp first brought defendant's attention to the Leavitt building; and that Gripp, and not plaintiff, brought about the agreement of August 22, 1912. And the evidence does not tend to show that defendant did not remain neutral as between plaintiff and Gripp, or that defendant was guilty of any wrong to plaintiff, and, in our opinion, plaintiff failed to prove his claim against defendant for commissions.

The judgment of the Municipal Court, therefore, will be reversed with a finding of fact, and judgment will be entered here for the defendant.

REVERSED AND JUDGMENT HERE FOR THE DEFENDANT.

FINDING OF FACT. We find that the plaintiff, Charles M. Hovey, was not the procuring cause in bringing about the agreement for the sale or exchange of the building owned by the defendant, D. A. Matteson, to Emanuel Leavitt.

ber Term, 1913.

461 - 19864

ABRAHAM LORENZE, Appellant,	)	
vs.	)	Appeal from Municipal Court of Chicago.
FOUR WHEEL DRIVE AUTO COMPANY, Appellee,	)	

188 I.A. 488

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Abraham Lorenze, plaintiff, commenced an attachment suit in the Municipal Court of Chicago against Four Wheel Drive Auto Company, a corporation having its principal office in Clintonville, Wisconsin, defendant. Subsequently the defendant entered its general appearance. In the amended statement of claim it was stated that plaintiff's claim was for a balance of $1,200, due him for commissions on account of the sale for defendant of 100 shares of its corporate stock to Mrs. W. E. Saville. In defendant's affidavit of merits it was stated that defendant was not indebted to plaintiff in any sum whatsoever, that plaintiff did not make a sale of said shares of stock on behalf of defendant, and that defendant never had any contractual relations with plaintiff as to the sale of said stock. The case was tried before the court without a jury, resulting in a finding and judgment for defendant, and plaintiff appealed to this court.

On October 22, 1912, the defendant entered into a written agreement with W. A. Olen, a resident of Clintonville, Wisconsin, and president of the defendant company. By the terms of said agreement it was provided that Olen should become the exclusive agent of defendant to sell its capital stock, and should have the privilege of selling 1,000 shares at not less than $110 per share; and should receive a commission of $15 for every share sold by him; that all applications for said stock should be taken on regular

blanks furnished by the company, one-half to be paid in cash and balance within 30 days; that Olen should receive his commissions as the stock was paid for; that he should have the right to appoint sub-agents to assist him in the sale of the stock; and that if he sold the amount of stock within the times provided in said agreement he should have the exclusive right to sell all the remaining stock, but that if he failed to do so the agreement might become void at the option of the company. Subsequently, on November 19, 1912, Olen, individually, entered into a written contract with the plaintiff, Lorenze, to which contract a copy of said agreement of October 22nd was attached and made a part thereof, and in which contract it was provided that plaintiff should have the exclusive right to sell stock, within a certain limited territory, in accordance with the terms of Olen's agreement with the company; that Olen should pay plaintiff a commission of $15 for each share of stock sold by plaintiff, to be paid as soon as the stock was paid for; that Olen granted plaintiff the right to sell 500 shares upon condition that the latter should sell 35 shares on or before December 22, 1912, and 50 shares every thirty days thereafter; and that in case Olen's agreement with the company should become void this contract should likewise become void. Duplicate copies of this contract were executed,- plaintiff retaining one and Olen the other.

Plaintiff testified, in substance, that he did not sell 35 shares of stock by December 22, 1912, that early in January, 1913, he had a talk with Olen, the president, and with Frank Gause, secretary, of the defendant company, wherein it was verbally agreed that he should thereafter make sales of said stock on behalf of the defendant company and should receive the same rate of commission as provided for in his contract with Olen. Both Olen and Gause denied that any conversation to that effect was then or at any time had

with plaintiff, or that the defendant company ever entered into any such verbal agreement with plaintiff. Olen testified, in substance, that early in January, 1913, he had a conversation with plaintiff relative to the continuance of plaintiff's contract with Olen, and that at that time plaintiff requested that Olen make an endorsement on plaintiff's duplicate copy of said contract; that Olen did so, and that that endorsement was to the effect that Olen extended said contract as long as Olen's agreement with the defendant company remained in force and as long as any stock remained to be sold. Plaintiff denied that such endorsement was made on his copy of the contract, but he was unable to produce the same, saying that it had been misplaced and that he had made diligent search but could not find it. Olen's copy of said contract, which was introduced in evidence, did not bear any endorsement. It further appeared from the evidence that subsequent to January 1, 1913, plaintiff made several sales of stock to various parties and received his commissions therefor,- some remittances being made by checks of the defendant company, which checks were charged to Olen's account with the defendant company. Various letters written to plaintiff and signed "W. A. Olen," or "W. A. Olen, president," were introduced in evidence, as were also some of plaintiff's letters addressed to said Olen individually or as "president." On March 23, 1913, plaintiff wrote W. A Olen, personally, as follows: "Apparently your stock deal with me is cleaned up - outside of my commission on the balance of Mrs. Saville's stock, and when can I expect a remittance for same?"

We cannot say that the finding and judgment are manifestly against the weight of the evidence, as contended by counsel for the plaintiff. It does not appear that the agreement between Olen and the defendant had been canceled. Nor does it sufficiently appear that plaintiff made a verbal agreement with defendant whereby the latter was to pay him commissions on stock sold by

him, or that defendant by its acts at any time recognized that it had any contractual relations with plaintiff. If plaintiff has not been paid all the commissions due him, his claim is against Olen personally and not defendant.

Neither do we think that the trial court committed any errors, prejudicial to the plaintiff, in its rulings on the admission of evidence, as also contended by counsel.

Accordingly, the judgment of the Municipal Court is affirmed.

AFFIRMED.

r Term, 1913, No.
471 - 19874

HELEN NEENAN,
Appellee,

vs.

NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY,
Appellant.

Appeal from
Superior Court,
Cook County.

188 I.A. 490

STATEMENT OF THE CASE. This is an appeal from a judgment for $920 rendered April 12, 1913, by the Superior Court of Cook County, following the verdict of a jury, in favor of Helen Neenan, plaintiff below, and against National Council of the Knights and Ladies of Security, a fraternal beneficiary society, defendant below.

In plaintiff's declaration, which consisted of one count, it was alleged in substance that on September 3, 1908, the defendant admitted Jeremiah Neenan to membership in the local council, No. 741, of the Order, located in Chicago, and issued to him a beneficiary certificate, duly signed by the officers of the national council of the defendant society, and duly signed by said Neenan "for the purpose of accepting the conditions of said certificate"; that defendant by said certificate promised to pay plaintiff, wife of said Neenan, upon his death the sum of $1,000, upon the terms and conditions in said certificate mentioned; that said Neenan died on October 7, 1909, at Chicago, while in good standing in said Order; that he during his lifetime, and plaintiff at all times since his death, complied with all the requirements of the certificate and the laws of the Order; that by means thereof defendant became liable to pay plaintiff the sum of $1,000; and that defendant has refused to pay said sum or any part thereof, wherefore there is due to plaintiff the said sum, together with interest thereon, at 5% per annum, from August 12, 1910, etc. The benefi-

ciary certificate was set out in haec verba in the declaration, and in one clause thereof it was provided that should said Neenan die within 18 months of the delivery of the certificate the National Council should be liable for only 80 per cent. of said $1,000.

The defendant filed a plea of the general issue and several special pleas, all of which, except the sixth, were withdrawn. This sixth plea, as amended, alleged in substance that the contract of membership between the defendant and said Jeremiah Neenan was composed of the certificate, application and by-laws of the defendant society; that it was provided in the by-laws that each member should pay one assessment each month on or before the last day of the month; and that if the member failed to pay said monthly assessment on or before the last day of said month said member should stand suspended without notice and all his rights forfeited under said certificate, but that he might reinstate himself at any time within 60 days from the date of said suspension by the payment of the current assessment and local council dues, and all arrearages of any kind, provided he be in good health; that by virtue of the contract between said Neenan and the defendant society there became due on August 1, 1909, a certain assessment from said Neenan, payable on or before the last day of said month of August, and that there became due on September 1, 1909, a certain assessment from said Neenan, payable on or before the last day of said month of September; that said August assessment was not paid during said month of August or during said month of September, and said September assessment was not paid during said month of September; that said Neenan became suspended on September 1, 1909, and remained in suspension up to and including the time of his death, October 7, 1909, and was not a member of the defendant society in good standing at the date of his death, and that neither he, nor anyone in his behalf, while he was living and in

good health, paid any assessment for the purpose of reinstating him; that on or about October 7, 1909, while said Neenan was in suspension and not in good health, assessments for the months of August, September and October, 1909, amounting to $4.50, were paid to the financier of said local council to which said Neenan belonged, and said payments were taken by said financier without knowledge on his part, or that of any officer or agent of the order, that said Neenan was not in good health; that thereafter, and immediately upon defendant learning that said Neenan was not in good health when said payments were made and before the beginning of this suit, said financier sent to plaintiff a check for the amount of said payments, which check has not been returned but has been retained by plaintiff, and which check has been at all times of the value of said payments.

To this special plea the plaintiff filed a replication in which it was alleged, in substance, that said Neenan was a member of the defendant society in good standing, as provided for in said contract, up to and including the time of his death; that while living and in good health he paid all assessments due from him for the purpose of his reinstatement and which did reinstate him before he died; that on October 7, 1909, "while the said Neenan was in good health," assessments for said months of August, September and October, amounting to $4.50, were paid to and taken by said financier and the latter did not return "to said Neenan" the amount paid by plaintiff.

At the beginning of the trial the defendant made a legal tender in open court to the plaintiff of $4.50, together with costs of suit, and interest thereon, but the tender was refused. Plaintiff testified in her own behalf and introduced in evidence the beneficiary certificate sued on and a receipt book showing the payments of dues and assessments on Neenan's account and the times when made. On behalf of the defendant, Harry W. Amey, the financier

of said local council, No. 741, testified, and defendant introduced the application of the deceased for membership, the constitution and by-laws of the defendant society, the certificate of death of said deceased, a check for $4.50 and letter accompanying the same, dated October 9, 1909, sent by defendant to plaintiff, and several other documents. In rebuttal the plaintiff again testified, and also a witness named Mrs. Mulvahill. At the conclusion of all the evidence the defendant moved for a directed verdict in its favor, but the motion was denied. The court directed that the testimony of the witness Mrs. Mulvahill, as well as certain portions of plaintiff's testimony, as to "custom" and as to "her delinquency in payments" be stricken from the record and disregarded by the jury. It was admitted in open court by the attorney for plaintiff that Jeremiah Neenan was not in good health on October 7, 1909, when the dues and assessments, aggregating $4.50, were paid on said Neenan's behalf to said Amey, financier of the local council, and that at and before that time said Amey had no knowledge that said Neenan was not in good health; and it was further admitted that a good and sufficient tender of said $4.50 was seasonably made by the defendant to the plaintiff about the time of the death of said Neenan. And it was stated by the court to the jury that the attorney for plaintiff admitted that "in no case could there be a verdict for more than $920," viz: $800 and interest. Three instructions offered by the defendant were given, and ten instructions offered by the plaintiff were refused. The court of his own motion wrote and gave to the jury two instructions, numbered 4 and 5. Instruction No. 4 referred to a certain "established custom and method of doing business adopted by the defendant" governing suspensions, and as to the time the financier made his monthly reports to the National Council, and was to the effect that if the jury believed there was such a custom and method, which was known both to the insured and the National Council, and that said Neenan,

on October 7, 1909, was in arrears for the month of September, 1909, only, and the financier, Amey, had not yet reported said Neenan to the National Council as delinquent, and that on said date Neenan had paid all his assessments in full, then the jury might find the issues for the plaintiff. Instruction No. 5 was to the effect that all evidence received and afterwards stricken out by the court must be disregarded by the jury.

The membership receipt book offered in evidence showed that Neenan's assessments and dues amounted to the sum of $1.50 per month; that said sum was paid to said financier of the local council for the months of November, 1908, and January, 1909, before the last day of each month; that like sums were paid for the months of October and December, 1908, and February, March, May, June and July, 1909, within 60 days after the last day of said months, respectively; that a like sum due for the month of April, 1909, was not paid to said financier until July 15, 1909; and that like sums due respectively for the months of August, September and October, 1909, were paid on October 7, 1909. Amey, the financier, testified that he personally had a verbal arrangement with plaintiff, who was also a member of the defendant society, that if either plaintiff or Jeremiah Neenan was behind in the payment of dues and assessments, he would pay out of his own pocket one month's assessment for them and plaintiff would subsequently repay him; that he was accustomed to forward to the National Council a written report about the 30th of each month, remitting for assessments paid by members during the preceding month, and giving the names of members suspended for non-payment of assessments; that he paid Neenan's April, 1909, assessment out of his own personal funds and did not report him as being in suspension when he forwarded said written report about May 30, 1909; that he also advanced Neenan's August, 1909, assessment out of his own personal funds and did not report him as being in suspension when he forwarded said written

report about September 20, 1909, but that, Neenan not having paid the September, 1909, assessment to the local council on or before September 30, 1909, or repaid to Amey the August assessment so advanced, he (Amey), in his October report, reported Neenan as being in suspension for failure to pay the September assessment; that at no time on either the books of the local council or the National Council did it appear that Neenan was in suspension as long as 60 days, and that after Neenan's admission as a member he was not re-examined by the medical examiner. Plaintiff testified that in case she was at any time in arrears as to the assessments of either herself or husband, Amey had agreed to carry them; that nothing had been said by Amey about his advancing the assessment for only one month, and that she never said anything to her husband about the arrangement with Amey.

It further appeared from the evidence that Jeremiah Neenan died at his home at 11:45 P.M. on October 7, 1909, of pneumonia; that he had been confined to his bed for four or five days prior to his death; that on the evening of his death plaintiff's brother took the $4.50 to the lodge room to pay the deceased's dues and assessments for August, September and October, 1909; that said amount was received by Amey, the financier, about ten o'clock in the evening, and that Amey did not know that Neenan was ill until about 11 o'clock that evening, when he was so advised by a member of the lodge.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for the defendant that (1) the verdict is not supported by the law or the evidence, and that the court at the conclusion of all the evidence should have directed a verdict for the defendant; (2) that the trial court erred in admitting improper evidence, prejudicial to the defendant, and the subsequent action of the court in striking out the same and instructing the jury to disregard said evidence did not cure the error; and (3) that instruction No. 4, given by the court of his own motion, was erroneous and prejudicial.

In view of the conclusion we have reached it will unnecessary for us to consider the 2nd and 3rd points above mentioned. In our opinion there can be no recovery had against the defendant in this case, and the court erred in entering the judgment.

It is well settled in this state that the constitution and by-laws, the application for membership and the benefit certificate, together constitute the contract of insurance (Love v. Modern Woodmen, 259 Ill. 102, 106); and that parties competent to contract are at liberty to enter into such agreements with each other as they see fit, and it is the purpose of the law and the function of the courts to enforce these contracts. (Crosse v. Knights of Honor, 254 Ill. 80, 84.) In his application for membership in the defendant society Neenan agreed that should he cease to be a member of the order, either by suspension, expulsion, or otherwise, he thereby released and forfeited all claim to the beneficiary funds, and that, if accepted as a member, he would faithfully abide by all the laws of the order. The beneficiary certificate issued to Neenan provided that at his death the National Council would pay plaintiff the sum therein mentioned, "he hav-

ing complied with all the provisions of the Constitution and Laws of the Order * * * and being at the time of his death a member of the Order in good standing"; and the certificate contained a clause to the effect that the certificate was issued in consideration of the warranties and agreements contained in the application, and his agreement to pay all assessments and dues which would become due while he remained a member. Section 113 of the by-laws of the society provides that all assessments for every month shall become due and payable on the first day of the month, and that the certificate of each member who has not paid such assessments and dues "on or before the last day of the month shall, by the fact of such non-payment, stand suspended without notice, and no act on the part of the Council or any officer thereof, or of the National Council, shall be required as essential to such suspension, and all rights under said certificate shall be forfeited." This provision is self-executing. (National Council v. Burch, 126 Ill. App. 15, 30; Lehman v. Clark, 174 Ill. 279, 288, 292.) Section 114 of the by-laws provides that any beneficiary member, suspended by reason of non-payment of assessments or dues, "may be reinstated by payment within 60 days from the date of suspension, of all arrearages of every kind, including assessments and dues, for which he would have been liable had he remained in good standing; Provided, however, That he be in good health at the time of reinstatement; Provided, further, That the receipt and retention of such assessment or dues, in case the suspended member is not in good health, shall not have the effect of reinstating said member, or of entitling him or his beneficiaries to any rights under his benefit certificate." The evidence in the present case shows that Neenan did not pay the August, 1909, assessment and dues, but that Amey paid them for him, by virtue of a private understanding between Amey and plaintiff, which was unknown to either Neenan or the National Council of the society, and that neither Neenan nor anyone for him paid the Sept-

ember, 1909, assessment and dues. By the non-payment of said assessment and dues on or before the last day of September, 1909, Neenan was, by virtue of section 112 of the by-laws, ipso facto suspended and he forfeited all rights under his certificate. He could, however, be reinstated as a member of the society, under section 114 of the by-laws, by making payment within 60 days of the date of said suspension of said assessments and dues and all arrearages, provided he was in good health at the time of reinstatement. The evidence further shows that, on October 7, 1909, within about two hours of the death of Neenan, while he was then in the last stages of a mortal illness, plaintiff, then knowing that he was seriously ill, caused her brother to pay to Amey, the financier of the local lodge, said past due September assessment and dues, the October assessment and dues, and the August assessment and dues, previously advanced by Amey; that the said sums, amounting to $4.50 were received by Amey without knowledge on his part or that of any officer of the defendant that Neenan was not in good health, and that Amey shortly thereafter returned to plaintiff the check of said local lodge for said sum, which plaintiff retained. We do not think Neenan was reinstated as a member. He was not eligible for reinstatement. (Busta v. Court of Honor, 172 Ill. App. 71, 76.) Furthermore, plaintiff, when she caused the said sum to be given to Amey, knowing at the time that Neenan was seriously ill, was not acting in good faith towards the society. (Royal Highlanders v. Scovill, 66 Neb. 213, 220.) And we do not think that the evidence sufficiently discloses any waiver on the part of the defendant society. The private agreement between Amey and plaintiff that the former would advance the assessment and dues for one month, or more, in case the same were not paid by Neenan or plaintiff, was not shown to have been known either to Neenan or the National Council. And the agreement was beyond the scope of the authority of Amey to make, as an agent of

the defendant society, and not binding upon it. (Love v. Modern Woodmen, 252 Ill. 102, 107.) Considerable evidence was offered and admitted on the trial in an attempt to show that leniency had been extended customarily by the local lodge to certain members thereof as to the payment of their assessments. Most of the evidence was subsequently stricken out by the court, but some of it remained. In our opinion it was all incompetent. "Proof of a custom is never allowed to overcome the express terms of a contract." (Benevolent Society v. Baldwin, 86 Ill. 478, 487; Dillon v. National Council, 148 Ill. App. 121, 130.)

The judgment of the Superior Court will be reversed with a finding of facts, and judgment for the defendant will be entered here.

REVERSED AND JUDGMENT HERE FOR THE DEFENDANT.

FINDING OF FACTS. We find that the insured, Jeremiah Neenan, failed to pay the September, 1908, assessment and dues and thereby became suspended as a member of the defendant society, National Council of the Knights and Ladies of Security; that said insured was not thereafter and before his death, on October 7, 1909, reinstated as a member of said society, and was not a member of the society in good standing at the time of his death; that the defendant society did not waive the default causing the suspension of the insured; and that the defendant society is not indebted to the plaintiff, Helen Neenan, upon the beneficiary certificate sued on.

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ELIZABETH STANTON, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
CHICAGO CITY RAILWAY COMPANY, Appellant.	)	COOK COUNTY.

188 I.A. 502

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Appellant, Chicago City Railway Company, defendant below, prosecutes this appeal from a judgment of $6500, recovered by appellee, Elizabeth Stanton, plaintiff below, in an action on the case, on account of personal injuries alleged to have been sustained by the negligence of appellant. The parties will be designated as plaintiff and defendant.

The declaration contained one count. The negligence averred is that on December 15, 1910, while the plaintiff was entering a street car owned and operated by the defendant in the city of Chicago, and before the plaintiff was able to get securely upon the platform of the car, the defendant, through its servants in charge of the operation and management of the car, negligently started the car forward without notice or warning to her, and with unusual force and violence, so that the plaintiff was thereby thrown from the car to and upon the ground and injured.

The plaintiff was a dressmaker, living at 5149 Emerald avenue, Chicago. Her regular way of going home from the place of her employment was to ride west on a 47th street car from Langley to Halsted street, and then to transfer and go south on Halsted street to 52nd street. She left her place of work about 5:30 in the evening of December 15, 1910, and rode west on a 47th street car, accompanied by Mrs. Meyers, another dressmaker. The plaintiff and Mrs. Meyers received transfers and dismounted at the east side of Halsted street; they then crossed over to the northwest corner of the intersection of Halsted and 47th streets, and wait-

ed for a southbound Halsted street car. This was an important junction point and a number of persons were at the time waiting to board cars. Some Halsted street cars ran south as far as 69th street, and others ran as far as 79th street. Both classes of Halsted street cars ran as far south as plaintiff and Mrs. Meyers desired to go, the plaintiff desiring to leave the car at 52d street and Mrs. Meyers at 60th street.

After they reached the northwest corner, a number of southbound cars arrived, but the women did not board them either because they were Center avenue cars running west from that point or because they were too crowded. Finally a southbound Halsted street car came up, and stopped a little north of the north line of 47th street. This car was a double truck, pay-as-you-enter car with a large rear platform, partitioned off in the manner that pay-as-you-enter platforms are usually arranged. On behalf of defendant it is claimed that the car was very drowded and that a large number of persons boarded the car ahead of the plaintiff. Plaintiff does not concede that the car was so crowded as defendant's witnesses testified it was, and plaintiff and Mrs. Meyers did not state that as many passengers boarded the car ahead of plaintiff as defendant's witnesses did, though these witnesses testified that five or more passengers got on ahead of plaintiff. Plaintiff followed the other entering passengers and had placed her right foot on the step and her left foot upon the platform, and had grasped the upright bar that divided the entrance of the platform, when the car started. The lower step of the car was 14-1/2 inches above the ground and the platform was 13-1/2 inches above the step, so that the platform was 28 inches above the ground. The conductor stood on the rear platform in the railed-off space in which conductors usually stand on those cars. When the car started, Mrs. Meyers had not got on the car, but remained on the ground with many other persons waiting to board cars.

On behalf of plaintiff it was claimed that she was thrown to the ground by the starting of the car and that the car started with some jerk. She testified that although she had both feet on the car, one on the platform and the other on the step, and although she had a firm hold of the upright bar with her right hand, the starting of the car dislodged her so that she was swung around against another passenger who had been standing north of her on the step, so that her body then swung around with her back to the south, and that her feet, one at a time, slipped off the car. The only witnesses to the occurrence on plaintiff's behalf were herself and her friend, Mrs. Meyers.

On behalf of defendant it was claimed that plaintiff fell by reason of her attempting to step off backwards from the moving car as soon as she discovered that the car was starting and leaving her companion behind. Defendant contended that the sole cause of the accident was plaintiff's voluntary act in stepping from the car in such a manner that she herself lost her balance by getting off backwards. Defendant's witnesses denied that there was any unusual jerk or lurch in connection with the starting of the car, and denied that plaintiff's body was swung against that of any other passenger. Six witnesses on behalf of the defendant testified as to the occurrence. The conductor died before the trial. Some of defendant's witnesses did not see the whole transaction. All of them testified that there was no sudden lurch or jerk in connection with the starting of the car. Three of them testified that the conductor, before starting the car, called out a warning thathe was about to start the car and that no more passengers should enter. Three other witnesses testified that plaintiff voluntarily stepped off the car after it had started in motion. hese last mentioned witnesses testified that Mrs. Meyers called out, "Oh, Lizzie," or something to that effect, which was just before plaintiff stepped from the car.

Plaintiff fell with her head to the south and with her feet to the north. She struck first on the back of her head which was protected by her hair and by a turban hat she wore. She was immediately assisted to her feet and asked whether she wished an ambulance to take her home. She declined that aid and said she was able to get home on the street car. With Mrs. Meyers she boarded a following street car and rode on it to 52d street. Mrs. Meyers did not leave the car with her. Plaintiff happened to know a young lady on the car, who was not called as a witness, and that young woman then walked home with plaintiff to her home on Emerald avenue, a little over a block from the place where plaintiff left the car. Plaintiff walked upstairs to the apartment of her sister. She testified that she felt pain particularly in the back of her head and along her back.

She did not call or consult any physician for over two months after the accident. On February 17, 1911, she went to see Dr. John B. Murphy, who examined her and turned her over to an assistant, Dr. John F. Golden. Dr. Golden diagnosed her condition as tubercular inflammation of the spine. An inflammation of the spine is called a spondylitis, and when a spondylitis is tubercular, it is called Pott's disease. Dr. Golden was of the opinion that plaintiff's trouble was Pott's disease. The part of her spine which he claimed was thus affected was in the lower dorsal region, below the waist line. There was no abrasion of the skin or marked bruise at the point at which it is claimed the Pott's disease afterwards developed. Plaintiff testified that there was a slight puffiness or swelling and redness at that point which she observed by looking at it in a mirror. At the time of the trial, according to the testimony of Dr. Golden, the tubercular infection had ceased and plaintiff was considerably improved. He testified that his treatment and her wearing of a cast and leather jacket had eliminated the tubercular condition, so that while plaintiff's spine was not

quite as strong as it had been, it was not afflicted with acute Pott's disease at the time of the trial.

The defendant contends on the record that the verdict and judgment on the issue of liability are manifestly contrary to the preponderance of the evidence; that the damages are grossly excessive on any theory of the injury; that plaintiff's counsel made many improper and incurably prejudicial statements on the trial; that the court erred in giving an improper instruction, and also erred in admitting incompetent evidence.

It is contended on behalf of defendant that the trial before the jury was unfair and was not free from circumstances calculated to mislead or prejudice the jury. On the cross-examination of McNamee, a witness for the defendant, plaintiff's counsel interrogated the witness at length with respect to the first time he had been interviewed by the company to ascertain what he knew about the accident, and with reference to the talks he had had with the defendant's representatives before the trial. Counsel insinuated that McNamee was not at the place of the accident. He said to the witness, when he was questioning him about how he happened to be at the intersection, "Did you have an intuition that an accident was going to happen?" He cross-examined the witness at length as to where he had been on the day of the accident and how he happened to be on the corner of 47th and Halsted streets at the time. The substance of the cross-examination was an attempt to show that the witness' testimony was a fabrication of recent date. On the re-direct examination defendant offered to show, that in the letter, which McNamee had testified to on cross-examination he wrote to the company a few days after the occurrence, replying on its inquiry blank form to questions there propounded, he gave the same account of the occurrence that he had given on the stand. To overcome the effect of defendant's offer of testimony, plaintiff's counsel, it is claimed, made

grossly improper statements calculated to prejudice the defendant before the jury in the following examination:

"Q. Mr. McNamee, did you receive - you mentioned that you received a letter, asking you to state what the facts were. I ask you, was that the letter? (Exhibiting paper to witness).

A. Yes, sir.

Q. Up to the time that you wrote that letter, in answer to the inquiry as to what you knew of the facts, had you talked with anybody at all connected with the Chicago City Railway in connection with the accident?

A. No, sir.

Mr. Condon: I offer this in evidence.

Mr. McShane: I object to it.

Mr. Condon: I will ask you to read that over to yourself (handing paper to witness).

Mr. McShane: If a man go out and fix up those kind of things with employes, getting it ready for the purpose for which it is being used, the whole thing would be a farce.

Mr. Condon: I object to the statement, if the court please, that there has been any 'fixing.' It carries with it - it is a term that has a common and well known application. It is a term used commonly by men who charge others with wrong doing, and I object to Mr. McShane's statement as just made.

Mr. McShane: I mean writing it, your Honor.

Mr. Condon: Oh, you mean- yes, you mean nothing. I am objecting to what he said, and I will ask the court to rule on it as an absolute outrage.

Mr. McShane: Wait. I say- I mean preparing a statement in writing, writing the statement, and I mean nothing else, that is all.

The Court: With that explanation, I think it may stand.

Mr. Condon: Now, then, after having read that statement, do you desire to change or modify any part of the testimony you have given here?

Mr. McShane: I object to that, your Honor.

Mr. Condon: He is trying to make it appear - the reason I ask that -

Mr. McShane: If he has not a right to get it in directly, he has not a right to get it in this roundabout way, and I object to it.

Mr. Condon: Would you like to look at it?

Mr. McShane: No, I don't want to look at it. It is cheap.

Mr. Condon: I object to that statement.

Mr. McShane: What I meant was-

Mr. Condon: He mades an unfair statement, and then apologizes.

Mr. McShane: You are trying to make something out of it. You asked me if I want to look at it. I know all those things, and it is sickening to me -

Mr. Condon: I object to that remark, that it is cheap, and ask the court to rule.

The Court: That remark may be stricken out.

Mr. McShane: I want to say, he held this to my face, and asked if I wanted to see it, and I certainly think it is very - I don't care for it.

Mr. Condon: Very what? Why don't you be courageous?

Mr. McShane: Yes. You want to get a few more exceptions. If it was not for that, I would be very candid with you.

(Thereupon the jury were excused from the court room.)

Mr. Condon: I desire to move that a juror be withdrawn in this case, and that we proceed immediately either to the empaneling of another jury, or that the case be continued, because of the remarks, and imputations in the remarks, made by Mr. McShane regarding the witness who has just testified, and the defendant in this case.

(Motion overruled; to which ruling the defendant duly excepted.)"

One witness, Dupil, was employed by a chattel mortgage man, and in the cross-examination of Dupil, plaintiff's counsel resorted to the following methods. Dupil testified:

"Mr. Lynch's business is that of a money broker. He does not lend money on wages, he loans on chattels. I am a collector for a chattel mortgage man. I have been a witness before.

Q. How many times?

A. I think only the once.

(Objected to by defendant as being immaterial unless there was one or the other of the parties to this lawsuit involved.)

Mr. McShane: Some men have a habit of being witnesses.

Mr. Condon: I object to that statement.

The Court: Objection sustained.

I never testified as a witness for this company before.

Q. Did you testify in a personal injury suit or death suit for anybody before?

(Objected to by defendant unless the question has reference to this defendant or plaintiff; objection overruled; to which ruling defendant duly excepted.)

A. No, sir.

Q. Are you sure?

A. To the best of my recollection.

Q. Can't you put it better than that?

A. To the best of my recollection.

(Objected to by defendant; objection sustained.)

I am forty-five years old and have been working for this chattel mortgage house eight years.

Q. In other words, they have a mortgage on people's furniture, and you go there, and if they don't put up, you throw them out.

(Objected to by defendant; objection sustained to the question)

Mr. Condon: I object to the manner and conduct of counsel in putting questions in that manner, seeking to bring discredit upon the witness. I am objecting to counsel's conduct in putting the question.

(Objection overruled; to which ruling defendant duly excepted.)

Q. What do you do now, what is your work?

A. Well, as a collector, to collect accounts that are a little back in their payment, a little slow.

Q. What do you do towards pushing them up a little when they are a little behind?

A. I talk to them and ask them about their accounts.

Q. Do you seize their property?

(Objected to by defendant as immaterial; withdrawn.)

Mr. Condon: I object to counsel asking frequent questions and then withdrawing them when objection is made, as improper."

A little later in the cross-examination of Dupil, the following occurred:

"Q. Do you know of the claim agents, lawyers, detectives, or anything of that kind?

Mr. Condon: I object to the remark 'detectives.'

Mr. McShane: Or investigators.

Mr. Condon: Just a moment. There is some more of it. I object to his making the statement in the sneering manner in which he does. It is improper, and I think, if the court please, that a counsel with an experience such as he has at the bar for so many years ought to be told that he should not do it. It is unjust if the time has arrived when counsel can, by his sneers, throw slurs both upon this defendant and the witnesses produced by it, and I object.

Mr. McShane: Let me suggest. About every time I ask a question, he gets up and makes one of these speeches, tantalizing in their character, to try and provoke a reply. He wants me to say something that a complaint may be made of later on. I have sat here quite patiently listening to his orations. Everything I say, he puts this and that meaning on it, and makes a speech, and I must sit here mute. I don't see that there is a thing that is asked this man that it is not perfectly proper. If he objects to the use of the word 'detectives,' I could say 'investigators,' and I just asked him now if he knows - if he has any acquaintance with any one connected with the legal or investigating department of this railroad.

Mr. Condon: I would not object to such a question, but I am objecting to his employing a term with an intent to cast a reflection upon this defendant, employing the word 'detectives," and the manner in which he does it, with that beautiful sneer of his."

Counsel afterwards repeated the testimony of the witness and asked him whether what he had said was true. After the witness had testified that he had given the conductor, on the night of the accident, the witness card which was exhibited to him on the trial, plaintiff's counsel broke in with the remark: "You could write that card if you had it yesterday, and if you had another one, you could write it now, couldn't you?"

In cross-examining defendant's witnesses, counsel for plaintiff resorted to the following:

"Q. Do you know John Harrington?

A. No, sir.

Mr. Condon: Mr. Harrington is not connected with the City Railway.

Mr. McShane: He is a graduate of your institution."

In the cross-examination of McGuire, counsel remarked that he questioned McGuire's being present at the place of the accident at all. At the time of making this remark, counsel thought he had put the witness in an embarrassing position by forcing the witness to admit that he had been calling upon a married woman, though it later

appeared that the married woman was a relative of the witness and that the witness had been visiting her with the rest of her family.

Later, in the cross-examination of McGuire, counsel put a question and then interrupted the witness when the latter started to answer it. Defendant's counsel remarked: "He started to answer and you interrupted him." Mr. McShane then said: "You are sparring here for time; he is just giving this gentleman a chance to get his wind. It is a fact, it is evident what the purpose is."

It appears from the record that the entire arguments were finished and concluded in the case at 4:30 P. M. The following occurred at the close of the argument:

"Mr. Condon: As it is rather late it is not fair to the jury to send them out at this time; the question ought to be left to the jury.

Mr. McShane: I object to any talk in the presence of this jury, just some cheap talk -

Mr. Condon: I believe myself this ought to be put up to the jury, as to whether they prefer to go out tonight or tomorrow morning.

Mr. McShane: That's it; a little cheap talk; a little play for the jury.

Mr. Condon: Not at all. Let them decide it. I think they ought to decide it at this hour. It does not make any difference to me.

Mr. McShane: You want a little cheap play here.

Mr. Condon: There is no cheap play about it, Mr. McShane. I have always done it, and you know it.

Mr. McShane: You have always made every little cheap play you could.

Mr. Condon: I have always done it, and it is the practice here. I tried a case last week and the court put the question up to the jury himself. What are you talking about?

Mr. McShane: Any little cheap play -

Mr. Condon: I am going to ask this court to do it. Let them decide it, that is all I am suggesting. I do not care how they decide it.

The Court: Gentlemen, what is the wish of counsel as to instructing the jury tonight?

Mr. McShane: You see, it just prejudices my - it puts this girl's case - prejudices this girl's case, because some of the jurors may want to go now. I think we all want to get through with this case, and I would very much prefer to have it all over with now. Thatis my wish.

Mr. Condon: My judgment about it is that sending out a jury at quarter to five- it is going to take probably half an hour to read the instructions.

Mr. McShane: It won't take fifteen minutes.

Mr. Condon: Well, it may be fifteen minutes, but it is a matter that ought to be put to the jury. Your Honor, it is not only proper, but frequently done.

Mr. McShane: I have been here longer than he has, and I say it is not customary and it is not frequent. It is very rare.

The Court: This jury were held over from last week. We will consult the wishes of the jury. Gentlemen of the jury, do you prefer to take your instructions and go out tonight, or would you prefer that it go over until morning?

(Thereupon the jury took a vote, and decided to wait until the following morning to receive their instructions, and retired.)"

At the end of the re-direct examination of plaintiff's witness, Dr. Golden, the following occurred:

"Q. I dislike at this time, if the court please, to detain the jury; I am going to ask the doctor to return Monday for further cross-examination.

Mr. McShane: I object to that; he knows perfectly well that he cannot possibly detain the doctor but a few minutes longer.

Mr. Condon: I will try and do the best I can; I am not anxious to detain the doctor, but I also am not anxious to hold these twelve men.

Mr. McShane: You are not anxious about this jury; you are just playing for their sympathy.

Mr. Condon: The doctor may answer in four or five questions. If he answers as I assume the answers would be, why, we possibly can conclude it in five minutes."

In his closing argument to the jury, Mr. McShane said:

"To repeat, if there was no more room in that car, and that conductor knew it, and he started that car, and you know how fast they run - with a woman out there standing on the step, it is almost criminal to start a car and run between blocks with a woman standing out there on the step -

Mr. Condon: I object, if the court please, to the remark of counsel that his conduct was almost criminal.

Mr. McShane: To do that thing would be almost criminal.

Mr. Condon: What is the court's ruling?

The Court: Proceed."

In our opinion the presiding judge failed to control counsel for the plaintiff in the cross-examination of the witnesses, and in his remarks before the jury, characterizing motions made by counsel for defendant and suggesting improper motives to defendant's counsel when there was no basis in the proceeding to warrant such insinuations. The court also failed to rule on proper objections when made by defendant's counsel to the remarks of plaintiff's counsel during the taking of testimony and in his closing argument to the jury. The remarks of plaintiff's counsel above quoted were calculated to arouse hostile and intemperate feelings in the minds

of the jurors and to prejudice the jurors against the defendant. A trial during which counsel is permitted to conduct himself in the manner in which plaintiff's counsel in this case did, is not a fair trial. Counsel's conduct and remarks were calculated to prevent that calm and unbiased consideration of the evidence which is indispensable to a fair and impartial verdict. How far the conduct of the plaintiff's attorney was potent to produce unfair results, we cannot say; but, it is better that appellee be put to the trouble and expense of another trial than that this court should appear to countenance and commend such violation of legal ethics. (West Chicago St. R.R. Co. v. Kean, 104 Ill. App. 147). Making accusations that the opposing party and counsel are guilty of deception or other dishonorable methods, when there is no evidence to warrant the accusation, is itself reversible error. (Scott v. Chicago & Alton R.R. Co., 232 Ill. 410; Wabash Ry. Co. v. Billings, 212 id. 37). In the Scott case, supra, the court said: "It would be a reproach and disgrace to the law and the courts if cases should be tried and the rights of the parties determined upon such grounds as the attorney presented to the jury as arguments in this case, or if a party could be permitted to retain the benefit of a verdict and judgment obtained by such means."

At the request of the plaintiff, the court gave the following instruction to the jury:

> "9. If under the evidence and instructions of the court, you find that the defendant is legally liable for and on account of plaintiff's alleged fall from or in connection with the street car; and if you further find from the evidence that plaintiff sustained injury to her spine as a direct and proximate result of said fall; then, and in such event, you are instructed that even though plaintiff had tubercular germs in her blood at the time of said fall, yet, if you further believe from the evidence that as a natural and proximate result of said injury said tubercular germs lodged at the point of said injury, and thereby caused a diseased condition of her spine, and that such diseased condition of her spine would not have occurred except for said fall and injury, then the defendant is legally responsible for said diseased condition of her spine."

The instruction is objectionable upon the ground that it submits to the jury a question of law, whether the defendant is legally liable. It should have submitted the question of fact to the jury as to whether the defendant was guilty of negligence in operating the car in question, thereby causing the alleged fall of the plaintiff.

The further objection to the instruction is made in argument that it authorizes a recovery of damages on a ground not alleged in the declaration which does not allege a right to recover damages for an aggravation or arousal of a diseased condition as outlined in the instruction. Under the holdings in Chicago Union Traction Co. v. May, 221 Ill. 536, and Chicago City Railway Co. v. Saxby, 213 id. 274, we think this objection to the instruction is not sound. These decisions are not in harmony with the decisions in Michigan and Ohio, and, perhaps, other states.

On the direct examination of Dr. Golden, he was asked the following question:

> "Mr. McShane: Assume, doctor, that her injury - that this woman, on December 15, 1910, fell from the step of a street car and landed on her back. Have you an opinion as a medical man as to whether that injury was sufficient to cause the condition you have described?"

The question was objected to as not a hypothetical question; that it usurped the function of the jury; that it was for the jury to determine whether the accident caused or produced the condition. The objection was overruled, and defendant excepted. The witness answered, "Yes, sir." He was then asked: "What is your opinion, doctor?" The same objection was made and overruled. The witness answered: "It was sufficient to cause the condition I found and treated her for."

In the next question counsel for plaintiff gave a history of a suppositious case, and then asked: "Upon that history, have you an opinion as to whether or not that fall was the cause of that

swelling and the other conditions you have described?" The same objection was made and the same ruling by the court followed. The witness answered, "I have." Q. "What is it?" A. "That the fall was the cause of her present condition." The same objection and ruling occurred before the answer. Defendant's attorney then moved to strike out the answer on the same grounds and further that the doctor was not asked as to the cause of her present condition.

"The rule is that a witness cannot be permitted to give his opinion on the very fact which the jury is to determine." (Illinois Central R.R. Co. v. Smith, 208 Ill. 608). In City of Chicago v. Didier, 227 id. 571, there was no dispute as to the manner and cause of the injury, nor was there any dispute that the injury was caused by the fall, and it was held not improper for that reason to ask the doctor what he would say was the cause of the condition in which he found the knee. The same was true in the Roberts case, 229 id. 481, and in the Fuhry case, 239 id. 548, as the Supreme Court pointed out in Schlauder v. Chicago & So. Trac. Co., 253 id. 154. But in this case, as in the Schlauder case, there is a dispute as to the manner of the injury, and whether or not the fall was the cause of plaintiff's alleged subsequent condition, and under the cases cited above the ruling of the court in permitting Dr. Golden to give an opinion as to the ultimate fact was reversible error. See also Keefe v. Armour & Co., 258 id. 28; Lyons v. Chicago City Ry. Co., 258 id. 75; People v. Schultz, 260 id. 35.

The question of liability of the defendant in this case, including, as it does, the question of contributory negligence by the plaintiff, is involved in grave doubt. The only substantial injury claimed by the plaintiff is that she suffered from Pott's disease, or tubercular spondylitis. The claim that plaintiff had tubercular inflammation of the spine rests solely on the diagnosis of a young physician, Dr. Golden, whom she employed to treat her.

On the trial, defendant requested that plaintiff consent to an examination by a disinterested physician to be appointed by the court. With the consent of both parties, the court appointed as an examining physician Dr. John Ridlon. After a thorough examination of the plaintiff, Dr. Ridlon testified fully as to his findings, and completely rejected the diagnosis of tubercular inflammation of the spine and said there was no objective evidence of any injury to the spine, or of any disorder or abnormality therein. This testimony, in connection with the physical circumstances of the accident and the subsequent history of the case and the substantial recovery of the plaintiff make it seem impossible that the fall produced Pott's disease or that plaintiff suffered injury for which she should recover $6500. We think the verdict on the record before us is excessive.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

er Term, 1912. No.
385 - 19786.

In The Matter of the Estate of MATTHAUS HEMPFLING, Deceased.

ANDREW HEMPFLING, Executor of the Last Will of MATTHAUS HEMPFLING, Deceased,

Appellee,

vs.

EMILY HEMPFLING, ANDREW HEMPFLING, OSCAR GLEICHNER, MATTHEW GORZYNSKI, DANIEL DUKART, CHARLES DROZDIK and ANTON GLEN,

Appellants.

188 I.A. 542

APPEAL FROM

PROBATE COURT,

COOK COUNTY.

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This appeal brings up for review a decree of the Probate Court of Cook County, ordering a sale of the real estate of Matthaus Hempfling, deceased, to pay debts and the widow's award. The right and power of the court to decree the sale of the real estate is challenged on the ground that there was sufficient money of the estate to pay the widow's award and debts proved up and allowed, and that the money left by the deceased should be first resorted to and used for that purpose.

The last will and testament of Matthaus Hempfling, deceased, who died March 8, 1911, was proved and admitted to probate, and letters testamentary, dated June 10, 1911, were issued to Andrew Hempfling, executor named in the will.

Inasmuch as the decision of the main question raised on this record turns on the provisions of the will, we quote them in full as follows:

"First - That after all my just debts and funeral expenses are paid, -

I give, devise and bequeath to my wife, Emily Hempfling, my 'Real estate' and 'Bakery Business' at number 1701 West Erie street, in the city of Chicago and County of Cook and state of Illinois. Providing that said Emily Hempfling should get married again, or in the event of the death of said Emily Hempfling, my wife, the above mentioned real estate

and bakery business shall be held in trust for my two children, Andrew Hempfling also Helen Hempfling, minors, who reside with my wife, Emily Hempfling, at number 1701 West Erie street, in the city of Chicago, County of Cook and State of Illinois, until they shall become of age, each to have share and share alike.

Second - I bequeath to my sister, Barbara Hempfling, residing in the city of Statoteinak, Bavaria, Europe, the sum of Five Hundred Dollars.

Third - I bequeath to the Catholic Church at the town of Hohenberg, Germany, the sum of Five Hundred Dollars.

Fourth - I bequeath to Alexian Brothers of Chicago, in the city of Chicago and County of Cook and state of Illinois, the sum of Five Hundred Dollars.

Fifth - I have set aside Five Hundred Dollars for all expenses incurred in my last illness and death, the same moneys as I have bequeathed above is deposited in the First National Bank, making a total of Two Thousand Dollars, and the said First National Bank is located at the northwest corner of Dearborn and Monroe streets in the city of Chicago and the state of Illinois."

The inventory of the estate, approved July 7, 1911, showed the following property:

Personal Estate:	
The goods and chattels as per appraisement bill	141.00
Cash on hand in First Trust & Savings Bank, pass book No. 116,563	2017.00
Total personal estate	$2158.00
Real Estate:	
Lot 49, in subdivision of Block 15, in the Canal Trustees subdiv. of sec. 7, T. 39, N. R. 14, E. of 3rd P. M., which property is improved with a store and dwelling and is clear of incumbrance.	
Widow's award, approved July 7, 1911, for	1500.00
Just and true account, approved March 3, 1913, finds personal estate as per appraisement	141.00
Cash on hand from collection of account in First National Bank	8090.46
Total	$9231.46
Debts:	
Amount set aside for payment of specific legacies under paragraphs 2, 3 and 4 of the last will and testament of the testator	1567.84
Claim of Emily Hempfling, widow's award, Class 2	1500.00
Claim of Charles Burmeister, Class 3	157.00
Claim of St. Boniface Church, Class 1	10.00
Claim of Emily Hempfling, Class 5	100.00
Total	$3334.84
Deficiency of personal assets	$1103.38

Appellants specific contentions are, (1) that the decree directing the sale of the real estate to pay the widow's award is wrong and erroneous; (2) that the executor should be directed to pay the award out of the money in his hands; and (3) that the bequests of money in the will be abated to that extent; and (4) that the decree should be reversed with directions accordingly.

In support of these contentions, counsel for appellants cite Lesher v. Wirth, 14 Ill. 39; Cruce, Admr. v. Cruce et al., 21 id. 51; Phelps v. Phelps, 72 id. 546; and Miller v. Miller, 82 id. 467. These cases are not, in our opinion, applicable to the case presented in the record. The questions here involved are not the same questions discussed in the cases above cited. The facts here are different and call for the application of different principles of law.

Whether the Probate Court erred for want of power in ordering the sale of real estate to pay debts while there was personalty in the estate depends upon the construction of the will. Ordinarily, personal property is the primary fund for the payment of debts and general legacies, unless a contrary intention on the part of the testator satisfactorily appears. If, however, from the whole will, it appears by express language, or by necessary implication, that a particular portion of the estate is to be the primary fund for the payment of the debts, the remainder of the estate will be exonerated from the burden, (Brown v. Saathoff, 139 Ill. App. 617). A direction in the will, that a devise of real estate shall be taken subject to the payment of debts, if the property devised is adequate for that purpose, will exonerate the personal estate. (Underhill on Wills, Sections 375 and 380).

In Harris v. Douglas, 64 Ill. 475, it was held:

"The principle deducible from the authorities in this country is that where it clearly appears to have been the

intention of the testator to charge his real estate, to the exclusion of his personal property, the words in the residuary clause of the will, 'After the payment of my debts', will be sufficient for that purpose. This is the common law rule as modified by statute in most of the American states."

The first clause of the will here involved reads: "That after all my just debts and funeral expenses are paid, I give, devise and bequeath to my wife, Emily Hempling, my real estate and bakery business, at" etc., giving the street number in Chicago. Under the authorities cited and many others, this language clearly conveys the testator's intention to charge his real estate with the payment of his debts. But, the following clauses of his will, in which he specifically disposes of all his money in the bank, makes his intention clear beyond the possibility of question. (Virgine v. Virgine, 65 N. Y. Eq. 417; Fenwick v. Chapman, 9 Pet. 461; McCullom v. Chidester, 63 Ill. 477).

The testator at the time of his death owned a piece of real estate valued in the petition at about $10,000. This valuation is not denied in the record or questioned. The testator, therefore, did not intend to deprive his widow of her award. This he could not do. He intended, as we gather from the will, to charge his real estate with the payment of the award and his few small debts, knowing that the real estate was more than sufficient to pay them and the costs of administration.

There is no error in the decree and it is affirmed.

AFFIRMED.

h Term, 1914. No.
229 - 20156.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
vs.
GUST ANDERSON,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

188 I.A. 550

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This writ of error is brought to reverse a judgment of the Municipal Court of Chicago, finding Gust Anderson, the plaintiff in error, guilty of an assault and battery on Jonas Olson, and fining him $100 and costs, and committing him to the House of Correction of the city of Chicago until the fine and costs are paid or are worked out at the rate of $1.50 per day.

The first error relied upon is that the name of the injured party is not proved by the record. We think this point is not borne out by the record. Anna Olson made the complaint, charging that the plaintiff in error maliciously made an assault upon Jonas Olson. The evidence in the record shows that Jonas Olson was the husband of the complaining witness and the party who was struck and injured.

The second ground of error is that the court had no authority to compel plaintiff in error to pay money to Jonas Olson. It is a sufficient answer to this contention to say that the record does not show that the court compelled plaintiff in error to pay money to Olson. The court, in some talk during the trial, attempted to induce plaintiff in error to pay Olson some money for his doctor's bill and attorney's fees as an equitable settlement of the affair; but this proposition was rejected by plaintiff in error and the court said no more about it. The evidence sustains the judgment, which is affirmed.

AFFIRMED.

Mr. Justice Barnes:- I think the record fails to identify the person assaulted.

ber Term, 1912. No.

380 - 18847.

CHARLES CHAPMAN, vs. CHARLES T. RICHEY et al., On Appeal of HERBERT W. DUNCANSON, Appellant, vs. CHICAGO TITLE & TRUST COMPANY, Trustee, et al., Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

188 I.A. 551

MR. PRESIDING JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

On October 30, 1905, William J. Lukens, the owner of certain premises located on the corner of Evanston avenue and Ainsley street, Chicago, concluded negotiations with Herbert W. Duncanson for the sale of the same for $6,400, $3,200 to be paid in cash and the balance by two notes of $1,600 each, payable in two and three years, to be secured by a mortgage upon the premises subject to a first mortgage bond issue of $40,000 to be given for the improvement of the premises by the erection of an apartment building thereon, and at the instance of Duncanson the premises were conveyed to Charles T. Richey, an employee of Duncanson, who purports to have been engaged in the building business. This deed was acknowledged January 31, 1906, and recorded April 6, 1906. On January 26, 1906, Duncanson arranged with the Jennings Real Estate Loan Co., hereinafter called the Loan Company, for the negotiation by it of a $40,000 bond issue to be secured by a first mortgage on the premises and the building to be constructed thereon, and Richey then executed 300 bonds, numbers 1 to 150 for $100 each and numbers 151 to 300 for $500 each, two of such bonds numbered 1 to 96 maturing each month beginning

January 26, 1907, and the remainder of such bonds maturing January 26, 1911. Richey then also executed a trust deed on said premises to the Chicago Title & Trust Company to secure the payment of said bond issue, which trust deed was acknowledged February 9, 1906, and recorded February 14, 1906. On January 27, 1906, Duncanson, acting for Richey as the owner of the premises, contracted for work and material for the construction of said apartment building on said premises with various parties as follows: A. Deppmann & Company, for heating plant, $1,953; Silvercerg Brothers for glass and glazing, $340; C. W. Fellgren & Son for carpenter work, $10,000; A. J. Fisher Plumbing Company for plumbing work, $3,490; Charles Olsen for painting, $1,500; D. J. Ingram & Company for electrical work, $600. On January 31, 1906, a like contract was made with Charles Chapman for the mason work for $9,750. On the same day C. W. Fellgren & Son, contractors for the carpenter work, contracted with Bauer, Peterson & Co. for certain lumber for $8,750, and on February 9, 1906, Charles H. Moore & Co. contracted with said Fellgren & Son to furnish the mill work for $3,250. During the progress of the work Charles W. Fellgren contracted with Emma Kreuger for some hardware for $350. Between April 6th and June 8th, 1906, at the instance of Duncanson, a partial payment out of the proceeds of the bond issue was made to each of several contractors as follows: April 13th to A. Deppmann & Co. $1,000; April 24th to D. J. Ingram & Co. $300; April 25th to A. J. Fisher Plumbing Co. $1,500; April 27th to Charles Chapman $5,000; May 25th to C. W. Fellgren & Son $300; May 25th to Charles Olsen $300. Upon the payment of said amounts each of said parties signed a receipt therefor and waiver of lien, which, except as to date, amount and designation of work, is identical with the one signed by Charles Chapman, as follows:

"Form 4606 WAIVER.

$5,000.00 Chicago, April 27, 1906.

Received of Charles T. Richey Five Thousand and No/100 Dollars, to apply on mason contract work Contract on building S. W. Cor. Evanston and Ainsley. The undersigned for and in consideration of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, does hereby waive and release any and all claims or liens on said building under any Acts in relation to mechanics' liens, approved or in force, on account of labor or materials, or both, furnished or which may be furnished by the undersigned for said premises.

"HAS. CHAPMAN, Contractor."

On June 8, 1906, a considerable portion, being approximately $11,000 of the bond issue of $40,000, remained unexpended in the hands of the Loan Company, which amount Duncanson and Richey directed said Loan Company to pay out upon the orders of one Edward Bittner, with whom one Smiley, acting for Duncanson, had negotiated an exchange of the property here involved for some property claimed to be owned by said Bittner, and by deed dated April 26, 1906, recorded and delivered June 8, 1906, Richey conveyed said property to Bittner. Before the delivery of the deeds by Bittner of the property claimed to be owned by him, Duncanson, acting for himself, Smiley and Richey, on July 17, 1906, repudiated the transaction with Bittner for alleged false representations and for partial failure of consideration, and filed a claim for a vendor's lien against the property in question for a pretended equity therein of $9,400, and on the same day Bittner conveyed the property in question to Anna M. Brooks. Subsequent conveyances of the property by Anna M. Brooks and her grantees are unimportant.

On August 7, 1906, Charles Chapman filed his bill in the Superior Court to enforce a mechanics' lien for the balance claimed to be due on his contract for labor and material and also then filed his motion for the appointment of a receiver for the property. On August 13, 1906, while the motion for

the appointment of a receiver was pending, Edwin B. Jennings, the owner and holder of $9,000 of the bonds secured by the trust deed on the property, being more than 80% of the total bond issue, notified the Chicago Title and Trust Co. of his ownership of said bonds and that by reason of the default of the maker in the terms of said trust deed in failing to pay the general taxes for the year 1905, prior to May 1, 1906, and the default of the maker in not discharging certain liens of mechanics and material men upon the premises, and by the filing of the bill for a mechanics' lien by Charles Chapman, and default of the maker in failing to complete and render tenantable the building within a reasonable time, he elected to declare the whole amount of principal and interest of the bonds secured by said trust deed immediately due and payable, and requested the Chicago Title & Trust Co. to immediately institute foreclosure proceedings. On August 14, 1906, in response to said request, the Chicago Title & Trust Co. filed its bill in the Superior Court to foreclose the deed of trust. Thereafter a receiver for the property was appointed by the court, and the two causes were consolidated. The several lien claimants heretofore mentioned, with others claiming mechanics' liens on the property, filed their answers and also their intervening petitions to enforce such liens, and a large number of bond holders answered the bill setting up ownership of their respective bonds. Cora E. Lukens, as executrix of the last will and testament of William J. Lukens, filed her answer setting up her ownership of the second mortgage. Duncanson and Richey filed their answer denying that there had been any default in any of the terms of the trust deed; averring that the foreclosure was not brought in good faith, but for the purpose of involving the property in litigation and confusion to cover up a shortage of $8,617.60 in the loan; averring that all mechanics' lien claimants had waived their liens, and that the

claims of certain lien claimants had not been filed of record for thirty days at the time of the filing of the bill; averring the sale of the property to Bittner and the failure of consideration and asking for a vendor's lien thereon for $9,400, subject to the Lukens' mortgage; attacks the right of certain claimants of certain bonds to recover thereon, and asks that a third mortgage on the property executed by Bittner be declared void and ordered cancelled. Richey and Duncanson also filed their cross-bill, wherein they prayed for the same relief asked by them in their answer. This cross bill was subsequently amended by setting forth that the record title to the property was in Richey, but that Duncanson was the real beneficial owner thereof and that Richey had conveyed to Duncanson all his right, title and interest in the property and in certain alleged funds in the hands of the loan company and of one J. Elliott Jennings. On January 31, 1910, the Chicago Title & Trust Co. filed its amended and supplemental bill, wherein it set forth inter alia that since the filing of the original bill certain bonds had matured and default had been made in the payment thereof and the interest coupons thereon and that certain holders of said bonds had requested the trustee to institute foreclosure proceedings either by original or supplemental bill. Said amended and supplemental bill was answered by Richey and Duncanson, and the consolidated cause was then referred to a master to take and report the proofs with his findings. On July 1, 1912, a decree was entered in accordance with the findings of the master. The decree finds that default had been in the terms of the trust deed in that the taxes for 1905, were not paid before May 1, 1906, and also in that mechanics' liens had been permitted to attach to the premises, and that such default had continued for more than 30 days prior to the filing of the original bill to foreclose the trust deed; that the right to foreclose said trust deed also accrued by reason of the defaults

alleged in the amended and supplemental bill; that there was due the Chicago Title & Trust Co. for its certain proper disbursements $810.07, also for its solicitor's fees $5,000, and for its services $250; that there was due to the several designated bond-holders for principal and interest upon their bonds, including the sum of $838.03 to the United States Trust Co., the several amounts therein set forth; that each and all of said bonds were an equal lien upon the premises and were entitled to be paid next after the payment of mechanics' liens, taxed costs and amounts found due the Chicago Title & Trust Co. for its disbursements, expenses and solicitor's fees; that the following several mechanics' lien claimants were entitled to mechanics' liens upon the premises for the several amounts, as follows: Charles Charman whose lien attached January 31, 1906, $6,057.95, including interest at 5% from July 25, 1906; William L. Barnum, Jr., as assignee of Charles Olsen, whose lien attached January 27, 1906, $779.36; A. Seppman & Co., whose lien attached January 27, 1906, $261.95; D. J. Ingram & Co., whose lien attached January 27, 1906, $388.79; A. J. Fisher Plumbing Co., whose lien attached January 27, 1906, $2,487.75; American Trust & Savings Bank, Trustee in bankruptcy of Silverberg Bros., whose lien attached January 27, 1906, $451.24; Charles H. Mears & Co., whose lien attached January 27, 1906, $3,589.65, including interest at 5% from July 15, 1906; Bader, Peterson & Co., whose lien attached January 27, 1906, $1,365.00, including interest at 5% from July 1, 1906; Anna Krueger, whose lien attached January 27, 1906, $486.77, including interest at 5% from July 15, 1906; that there was due upon the Lukens second mortgage $4,305.36; that there was due C. W. Waltzer Lumber Co., $612.68, upon its judgment against Edward A. Bittner.

The cross bill of Richey and Duncanson was dismissed for want of equity, and the decree further provided that upon

default in payment within 10 days of the several amounts as therein adjudged, the premises be sold and the proceeds divided in the order of priority as therein provided.

This appeal from said decree is prosecuted by Herbert W. Duncanson, and appellee, Chicago Title & Trust Co., has assigned cross errors and joined with appellant in attacking the decree in so far as it established the right of the several mechanics' lien claimants to mechanics' liens upon the premises.

It is insisted that the original bill for foreclosure was prematurely filed on August 14, 1908, because there was then no continuing default for thirty days in any of the covenants of the trust deed.

Article 3 of the trust deed provides, in part, as follows:

> "Said party of the first part further covenants and agrees to pay prior to the first day of May in each year all taxes and assessments on said premises at such time due and payable, and not to suffer any part of said premises to be sold for any tax or assessment whatsoever, or suffer any mechanic's lien to attach to said premises*****, and that they will complete and render tenantable within a reasonable time, free from all liens of every nature, any and all buildings now being erected or which may hereafter be erected thereon."

Article 4 provides that in the event of the failure of the mortgagor to pay said taxes and assessments or pay any liens of mechanics or material men or to complete or render tenantable within a reasonable time any building being erected on the premises, then the trustee or the holder of any of the bonds, may at its, his or their option, pay such taxes or assessments, or discharge or purchase any tax lien or title on said premises, or settle any lien of any mechanic or materialman, or complete said building, or make such repairs, and all moneys so paid with interest at 7% per annum from date of payment, shall become so much additional indebtedness secured by the trust deed.

Article 7 provides that "in case of default in the performance of any covenant or agreement herein made by the party of the first part, or their heirs, executors, administrators or assigns, and such default continuing for thirty (30) days, then the whole of said principal sum hereby secured shall at once (without notice thereof to said party of the first part, or their heirs, legal representatives or assigns), at the option of the holder or holders of twenty per cent (20%) of the bonds herein described then unpaid, become due and payable.

As heretofore stated, the original bill for foreclosure charged default by the maker continuing for thirty days prior to the filing of said bill in the following particulars, 1st, payment of the general taxes for the year 1905 prior to May 1, 1906; 2nd, failure to pay and discharge certain liens of mechanics and material men upon the premises; 3rd, permitting claims of mechanics or material men to accrue against said premises; 4th, failure to complete and render tenantable the building, within a reasonable time. An analytical consideration of each of the numerous questions raised by counsel and exhaustively argued in their briefs, would unduly extend this opinion. We have given each and every question raised deliberate consideration, and shall content ourselves with a brief statement of our conclusions upon only such questions as affect the merits of the controversy.

It is admitted that the mortgagor failed prior to the first day of May, 1906, to pay the taxes for the year 1905, and that the default of the mortgagor in that particular continued for 30 days prior to the filing of the original bill, but it is urged that the agreement of the mortgagor, "to pay prior to the first day of May in each year all taxes and assessments on said premises at such time due and payable, and not to suffer any part of said premises to be sold for any tax or assessment whatsoever", is one indivisible and inseparable

covenant, and that there could be no breach of the covenant until there had been a sale of the property for the tax or assessment.

The paramount rule for the interpretation of covenants is to so expound them as to give effect to the actual intent of the parties, collected not from a single clause, but from the entire context. Consolidated Coal Co. v. Peers, 150 Ill., 344. The application of this rule in the interpretation of the several covenants in the trust deed compels us to the conclusion that the covenant to pay taxes is a separable, independent covenant, for a breach of which a default accrued, and that it was not necessary that the mortgagor should have suffered the premises to be sold for taxes in order that the option of the holder or holders of the requisite amount of bonds might be exercised to declare the entire issue of bonds due and payable. The failure of the mortgagor to pay the taxes for 1905, prior to May 1, 1906, incurred a penalty which became an added burden upon the premises superior to the lien of the trust deed. The covenant to pay taxes prior to May 1st, is treated as a separate covenant in the provision in Article 4, whereby the trustee or bond holder or holders are authorized to pay the taxes in the event of the failure of the mortgagor to pay the same. Whether or not defaults accrued in either or all of the other particulars relied upon by appellee, Chicago Title & Trust Co., it is not now necessary to consider and determine, but the fact that we have refrained from discussing other grounds of default relied upon, and have predicated the right to file the original bill upon the one ground stated, may not improperly be construed as suggesting the conclusion by us that such other grounds are untenable.

It is urged that the allowance to the trustee of $5,000 for its solicitor's fees is unauthorized and excessive.

An allowance to the trustee of its reasonable solicitor's fees is expressly authorized by the terms of the trust deed. A consideration, however, of the evidence bearing upon that question, and of the necessary services performed by the solicitor for the trustee, as shown by the record, convinces us that an allowance of $5,000 is excessive. For the necessary services performed and responsibility assumed by the solicitor for the trustee in this case he will be amply compensated by an allowance of $3,000, and upon the remandment of the cause the decree will so provide.

There is no warrant for an allowance of $250, or any other sum, to the trustee for the use of its name in this proceeding. Some service and responsibility devolved upon the trustee for which it will be amply compensated by an allowance of $50.

The defendant, Edwin E. Jennings, filed his answer to the bill wherein he set forth that he was the owner of certain bonds aggregating $9,000, which amount, together with interest thereon at 7% per annum from January 26, 1907, was still due and unpaid. The decree erroneously allows to said defendant, Jennings, interest on said bonds from June 26, 1906. It is elementary that a party can not avail himself of a ground of complaint or defense not set up in a pleading, even though it appears in the evidence. Burns Lumber Co. v. Reynolds Co., 148 Ill. App., 358, and cases there cited. Interest should be allowed only from January 26th, 1907.

The decree allows to the United States Trust Co., as the owner and holder of bonds 119 and 151, $808.08 for principal and interest on said bonds. Said United States Trust Co. has failed to enter its appearance in this court and we are unable to find any evidence in the record which supports the decree in that particular.

The claims of each and all of the mechanics' lien claimants, except that of Silverberg Bros. for $451.24, assigned to the American Trust & Savings Bank, as trustee in bankruptcy of said claimants, are contested by both the Chicago Title & Trust Company, trustee, and appellant.

As to all of said lien claimants, with the exception of Silverberg Brothers and Charles H. Kearn & Company, it is insisted that by the execution by them or their principal contractors of receipts in the form heretofore set forth in the statement of the case, they are barred from asserting their claims for mechanics' liens upon the premises.

It is essential to every contract that it be based upon a good consideration. McLean v. McLean, 74 Ill., 134. In Bonney v. Bonney, 237 Ill., 452, it is said (461):

"The principal is elementary that an instrument affecting the rights of property, executed without consideration, has no binding force or effect in law and may be avoided as between the parties."

It is said that an agreement to waive a lien requires no consideration to support it, but no authority is cited which sustains such statement. That a consideration is necessary to support the waiver of a lien is clearly intimated in Paulsen v. Manske, 126 Ill., 72. Undoubtedly a lien may be waived in an original contract for labor and material and in Kelly v. Johnson, 251 Ill., 135, it is said (139):

"Clearly, if a lien can be waived in the original contract, it can be subsequently waived, for a valuable consideration, as between the original parties."

In 27 Cyc., 265, it is said: "A waiver of a mechanic's lien must be supported by a consideration in order to be effective." Again, at page 392, the authors say: "A release of a mechanic's lien must, in order to be effective, be founded upon a consideration." The cases cited support the text.

The same or similar statements are made in Rockel on Mechanic's Liens, sec. 189; Phillips on Mechanic's Liens, 474; and Boisot on Mechanic's Liens, sec. 733.

The payments made to the several lien claimants, when they signed the receipts and pretended waivers in question, were partial payments merely, or payments upon account for work and material theretofore performed and furnished by them under their several contracts. There was more money then due them than they received, and the only consideration for the pretended waivers was the money then paid to them. There was no bona fide dispute between the parties, the compromise of which would have been a good consideration. The absence of a consideration to support the pretended waivers rests on the ground that the agreement for the discharge of an entire debt by its part payment is without consideration. Jackson v. Security Life Ins. Co., 233 Ill., 161.

In Turnes v. Brenckle, 249 Ill., 394, the waiver in question appears to have been executed by the lien claimant in connection with or as forming a part of the original contract, or at least before any liability had accrued under the terms of the contract in favor of the contractor and against the owner.

In Kelly v. Johnson, 251 Ill., 135, the original contract between the contractor and the owners was subsequently modified by the contractor executing a waiver upon the payment to him of $5,000, which amount it does not appear was then due and owing to him under the terms of the original contract.

We concur in the conclusion arrived at by the master and the chancellor that the waivers here involved are ineffective for want of consideration.

As to the claimants, Baier, Peterson & Co. and Emma Kreuger, the receipt and waiver signed by their principal contractors, C. W. Fellgren & Son, would be ineffective, even if valid, because such waiver was executed subsequent to the

contracts between said claimants and said principal contractors. Kelly v. Johnson, supra.

That the claim of appellant that the instruments signed by the lien claimants were effective to waive their liens was an afterthought is evident from an inspection of a letter written by appellant to the loan company on June 8, 1906, as follows:

"This is to notify you that the building at the southwest corner of Evanston avenue and Ainslie street on which you made a loan of $40,000 has been this day sold to Edward Bittner, and the balance of $11,563.35 left in the loan will be paid out by Mr. Bittner in the discharge of the obligations on this property. You will take the necessary statements and waivers on the payment of this fund, as heretofore, to protect Mr. Richey in the matter."

The decree is erroneous in so far as it allows interest to the lien claimants, Charles Chapman and W. L. Burnum, Jr., assignee of Charles Olsen, from the time of the completion of the work by them on July 25, 1906, instead of from the time of the filing of their petitions on August 7, 1906, and November 5, 1906, respectively, because said lien claimants in and by their petitions failed to ask for interest from the date of the completion of the work, or failed to demand an amount sufficient to authorize an allowance of interest from said date. Walsh v. North American Cold Storage Co., 260 Ill., 332.

It is finally urged by appellant that the chancellor improperly dismissed for want of equity the cross bill filed by appellant and Richey to establish in them a vendor's lien upon the property for $9,400.

The cross bill presents no meritorious equity; there is no substantive evidence in the records to support it, and it was properly dismissed. Appellant never invested a dollar in the property. He caused the title to the property to be taken in the name of his employee's, who was financially irresponsible. He caused it to be burdened with incumbrances and

liens beyond its reasonable ability to carry, and so contrived and manipulated the title as to avoid personal liability for any indebtedness or any loss to himself, arising out of the venture. His efforts appear to have been directed to foisting the property, with all the indebtedness incident to it, upon others by means of an exchange, whereby he might secure a substantial pecuniary advantage to himself.

The decree is affirmed in part and reversed in part, and the cause is remanded to the Superior Court with directions to enter a decree in conformity with the views here expressed.

The costs of this appeal will be taxed, as follows: Three-fifths against appellant; one-fifth against the Chicago Title & Trust Co.; one-tenth against the United States Trust Company and one-tenth against Edwin R. Jennings.

DECREE AFFIRMED IN PART; REVERSED
IN PART AND REMANDED WITH DIRECTIONS.

October Term, 1912. No.

393 - 18860.

JACOB PIANCO, a minor, by his next friend, SARAH PIANCO, Appellee, vs. HERBERT L. JOSEPH & COMPANY, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

188 I.A. 555

MR. PRESIDING JUSTICE BAUER DELIVERED THE OPINION OF THE COURT.

This is an action of trespass on the case brought by appellee, Jacob Pianco, a minor, by his next friend, against appellant, Herbert L. Joseph & Co., a corporation, to recover damages for alleged malicious prosecution, wherein a trial in the Circuit Court resulted in a verdict and judgment against appellant for $500.

It is urged that the verdict is against the manifest weight of the evidence; that the trial court erred in giving and refusing certain instructions; and that the damages are grossly excessive.

On October 4, 1907, appellee, who was then between 16 and 17 years of age, purchased from appellant a diamond ring for $83, payable, as the instrument he then executed recites, $8 down and the balance in weekly installments of $2. On February 22, 1908, appellee, having in the meantime paid the several accruing installments on the purchase price of the ring, returned the same to appellant and purchased a larger ring priced to him at $225, upon which he paid $30 down and executed a contract of purchase therefor, whereby he agreed to pay the balance, $195, in weekly installments of $4. He also then executed a blank form of chattel mortgage, which appellant thereafter filled in by inserting a general description of the ring and a consideration therefor of $195, payable in weekly

installments of $4, with interest at 6% per annum. Appellee having made no further payments upon the purchase price of the ring, appellant on March 4, 1910, procured an information to be filed in the Municipal Court, charging that on or about May 20, 1908, during the existence of the chattel mortgage lien thereon, appellee, without having the consent of appellant, did then and there unlawfully and feloniously conceal, remove and sell said diamond ring, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois. Appellee was arrested under a warrant issued out of the Municipal Court upon said information, and was held in custody for about six hours, when he was admitted to bail. Thereafter, upon a trial in the Municipal Court of the offense charged in the information, appellee was acquitted and finally discharged.

Appellant says that the acquittal and discharge of appellee in the criminal proceeding were predicated upon his defense of infancy, whereby the instrument relied upon as a valid chattel mortgage, was, at his election, rendered void and unenforceable, and that the verdict and judgment in the present case are predicated upon the same ground. The portion of the record of the criminal proceeding offered in evidence in this case does not disclose the grounds upon which appellee was acquitted of the offense charged, and the fact of appellee's infancy is only material in this case upon the issue of probable cause, in so far as appellant is chargeable with knowledge of such infancy.

Appellee testified that when he purchased the first ring he informed appellant's salesman that he was sixteen and one-half years of age. Two witnesses called by appellant testified that appellee then stated he was twenty-one years of age, and one witness, whose duty it was to investigate the credit of intending purchasers of jewelry, testified that be-

fore the first ring was delivered to appellee, he called at appellee's place of residence and was there informed by appellee's mother that appellee was of age and could do as he chose about entering into a contract of purchase for a ring. The mother of appellee, when called as a witness in rebuttal, admitted that a man employed by appellant had come to her house and that she had a conversation with him, but denied she told the man that her son was of age. The contract of purchase of the first ring, which is signed by appellee, states his age to be twenty-one years. Upon this issue the decided weight of the evidence tends to show that appellant dealt with appellee in the belief in good faith that he was of full age and competent to contract.

Appellee testified that after he signed the papers in blank, on Saturday evening, for the purchase of the second ring, he was permitted by appellant to take the ring for the purpose of ascertaining what it was worth; that he had the ring priced and returned with it to appellant's place of business on the Monday following, and told appellant's salesman that the ring was worth only $60 or $75, and that he wanted his money back; that he then offered to return the ring to appellant; that appellant's salesman told him the papers were all filled out and he could not get his money back; that the next thing that happened was about two years after, when he was taken out of bed and arrested. Witnesses called by appellant denied that appellee ever returned to appellant's place of business after he procured the ring, and it is conceded that appellee thereafter neither paid nor offered to pay any further installments on the purchase price of the ring. We are not impressed with the truthfulness of appellee's statement that he was permitted by appellant to take the ring away for two or three days for the purpose of having it priced before he should be held to have purchased it. The statement

that a dealer in valuable jewels for sale on the installment plan conducted his business in such manner taxes our credulity.

It is clearly established by the evidence, indeed there is no countervailing evidence, that several persons employed by appellant as tracers made frequent and repeated efforts during the two years following the delivery of the ring to appellee and before his arrest, to locate appellee, and that their efforts in that regard were fruitless; that upon occasions when they went to his place of residence, they were informed that he was in New York, but his address was not known, or that his whereabouts was unknown.

The uncontradicted testimony of Frank Kline, the police officer who served the warrant upon appellee, is substantially as follows: "In May, 1910, I received a warrant authorizing the arrest of one Jacob Bianco. I looked for him about two weeks. I went to his house on Hermitage avenue near Twelfth street. I asked his mother if Jacob was home. She said, 'No' that he was out of town. I went back there two or three times. I arrested him on a Sunday morning. I went into his house, and he wasn't there, so I went next door into his brother-in-law's house. I went in the rear way and went in two or three rooms and did not see him, and in the front room there were folding doors and they were closed and hooked. They didn't want to let me in there, but I unhooked the door and I went in and I found him lying on a cot."

Appellee admitted that after he procured the ring from appellant he had the diamond re-set in a smaller setting.

In Mitchinson v. Cross, 58 Ill., 366, it is said:

"The gist of the action for malicious prosecution is, that the prosecutor acted without probable cause. If there is no malice, or if there is probable cause, the action will not lie. Malice, without want of probable cause, will not support the action; both must concur, though malice may be inferred from want of probable cause. Leidig v. Rawson,

1 Scam. 272; Jacks v. Simpson, 13 Ill. 702; Rose v. Innis, supra."

A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged, constitutes probable cause under the law. Rose v. Innis, 35 Ill., 487; Seigel, Cooper & Co. v. Tuebbecke, 133 Ill. App., 312. "The issue for the jury is not the guilt of the plaintiff." Anderson v. Friend, 65 Ill., 135.

A careful consideration of the evidence impels us to conclude that the verdict of the jury upon the issue of probable cause, that is, the finding that appellant instituted the criminal prosecution in question against appellee without probable cause, is contrary to the manifest weight of the evidence.

The verdict may have been prompted by error in the instructions.

The first instruction given at the instance of appellee is erroneous in that it fails to require the jury to find the facts upon which the announcement of law is there predicated, by a preponderance of the evidence in the case. The second instruction is abstract in form, and is so drafted that it was calculated to mislead the jury. The third instruction which relates to the measure of damages includes certain elements not supported by any evidence in the case, and is also faulty in failing to limit the jury to the consideration of such proper elements of damage as are shown by the evidence in the case.

The court did not err in refusing certain instructions tendered by appellant.

The thirtieth instruction refused was covered by other instructions given at the instance of appellant. If a

party tenders two or more instructions embodying the same legal principle, he cannot be heard to complain if the court adopts and gives to the jury the instruction which is least favorable to him.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1912. No.

409 - 18676.

JOHN F. DEVINE, Administrator of the Estate of JAMES DWYER, Deceased, Appellee, vs. CHICAGO CITY RAILWAY COMPANY and CALUMET AND SOUTH CHICAGO RAILWAY CO., Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

188 I.A. 558

MR. PRESIDING JUSTICE DAUNE DELIVERED THE OPINION OF THE COURT.

This is a suit by appellee against appellants to recover damages for wrongfully causing the death of appellee's intestate, James Dwyer, wherein a trial in the Superior Court resulted in a verdict and judgment against appellants for $5,000.

The case was submitted to the jury upon the first, second and third counts of the declaration.

The first count alleges that appellants were in possession of certain street railway tracks on South Chicago avenue whereon they were engaged in operating electric street cars; that deceased was employed by appellant, Chicago City Railway Company, as a track laborer and was engaged in laying bricks between the said tracks on South Chicago avenue; that appellants through their agents and servants, were then and there operating an electric car in a northerly direction along and upon said South Chicago avenue at a point about midway between 69th street and 71st street; that appellants and each of them, so carelessly, negligently and improperly drove, propelled and managed the said car at such a high and dangerous rate of speed, to-wit, the rate of 20 miles per hour, that the car aforesaid was, by reason of the negligence of appellants in operating the same, at such a high and dangerous rate of speed, driven with great force and violence against decedent

while he was then and there engaged at his work as aforesaid; that he was then and there knocked to the ground and so injured that he died, etc.

The second count further alleges that it became necessary for appellant, Chicago City Railway Company through its agents and servants, to carry materials across said tracks upon which cars were being operated by appellants; that it became the duty of appellants in operating their cars upon said tracks to give to the servants of appellant, Chicago City Railway Company, engaged in carrying material across and upon said tracks, reasonable time and opportunity to deposit the material so being carried by said servants and to so manage and operate their cars as not to cause injury to said servants of the Chicago City Railway Company; that appellants made default in their said duty in that, while decedent was engaged in carrying material to the portion of said roadbed between the two tracks and while exercising due care and caution for his own safety, they so carelessly, negligently and improperly drove, propelled and operated a certain electric car in a northerly direction along and upon South Chicago avenue without giving decedent any warning of the approach of said car by ringing a bell or blowing a whistle or any other means, whereby the said car was driven with force and violence upon decedent, etc.

The third count is substantially a composite of the first and second counts.

At the time in question there were upon South Chicago avenue, which runs in a north westerly and southeasterly direction, two street car tracks, the east track being the north bound track and the west track being the south bound track. The decedent was employed by the Chicago City Railway Company in the work of re-paving the right of way with brick, and was one of a gang of thirteen or fourteen men so employed. They

were working southward from 70th street, taking up the old brick, cleaning such of the old brick as were fit for use in re-paving, and re-paving the south bound track and the center space between the two tracks. When the old brick were removed from the pavement they were carried by the men to the west curb of the street and such as were fit for use in re-paving were there cleaned and piled up with the new brick necessary to be used. Shortly after 7 o'clock on the morning of the accident October 20, ~~1909,~~ the decedent picked up several brick from the pile at the west curb, and carrying them on his arm, walked in a northeasterly direction toward the car tracks. When he reached the center space between the two tracks he stopped and stooped over for the purpose of dropping or placing the brick in said center space, and while in such stooped position was struck on the right side or shoulder by the corner of a north bound car approaching on the east track, and thereby sustained injuries which resulted in his death.

Whether or not the motorman sounded a gong or whistle as the car approached the point where decedent was struck is sharply controverted in the evidence, and the evidence bearing upon the question of the rate of speed at which the car was then being operated is in close conflict. If the only issue to be determined was whether or not the negligence charged in the declaration was proven by the greater weight of the evidence we should not be justified in holding that the verdict of the jury upon that issue was unwarranted.

The allegation in the declaration that the decedent was, at the time of the accident, in the exercise of due care and caution for his own safety, was a necessary and material allegation, which appellee was required to prove. Newell v. C., C., C. & St. L. Ry. Co., 261 Ill., 505.

The place of the accident was not at a street crossing, but at a point north of 71st street and south of 70th street.

It is manifest from the evidence that, except for the car in question, the tracks there were clear of cars; that there was no obstruction to obscure a view by decedent of the approaching car, and that no conditions existed which excused his failure to observe the car as it approached. The work in which he was then engaged was of the simplest character, such as did not demand his particular attention, and in the full performance of which he had abundant opportunity to avoid being struck by an approaching car. He had actual knowledge that the tracks were in use for the operation thereon of cars, and there is no evidence of any rule or custom upon the observance of which he might have relied, requiring the motormen or other employes to notify laborers upon or near the tracks of the approach of cars. There is not a scintilla of evidence tending to show any act on the part of decedent, which indicated either that he did or did not actually see the car as it approached, but so far as the evidence discloses to the contrary, he walked upon and across the west track and upon the center space between the two tracks, wholly oblivious of any possible danger of being struck by an approaching car upon either track.

It is insisted by appellee that the doctrine announced in some of the cases, that "anticipation of negligence in another is not a duty which the law imposes", taken and applied in connection with a presumption arising from the natural instinct prompting the preservation of life and the avoidance of injury, is sufficient in itself to establish due care on the part of decedent in this case.

Where, as in the case at bar, the conduct of a person immediately before and at the time of an occurrence which results in his death is described by eye-witnesses, and there is nothing in the facts and circumstances surrounding the occurrence to indicate that the decedent perceived the danger

to which he was exposed, there is no room for the presumption sought to be availed of, and such presumption does not become operative. Newell v. C. C. C. & St. L. Ry. Co., supra.

Even where there is no eye-witness to the occurrence, such presumption is not available to establish due care on the part of the decedent, in the absence of proof of his character and habits in respect to care. Newell v. C. C. C. & St. L. Ry. Co., supra.

Respecting the other branch of the question involved it has been recently said:

"There is a presumption of law that every person will perform the duty enjoined by law or imposed by contract, and anticipation of negligence in others is not a duty which the law imposes. (Chicago, Burlington & Quincy Railroad Co. v. Gunderson, 174 Ill. 495; Chicago City Railway Co. v. Fennimore, 199 id. 9.) While that statement has often been made and the presumption is to have due weight in determining questions of negligence, it is manifest that the presumption is not a conclusive one and that no one has a right to rely solely upon it in regulating his own conduct. The presumption does not absolve one from exercising such care and prudence as a reasonably prudent person would under the same circumstances.***** One who has an unobstructed view of an approaching train would not be justified in closing his eyes and crossing a railroad track in reliance upon the presumption that a bell would be rung or a whistle sounded. No one can assume that there will not be violations of the law or negligence of others and offer the presumption as an excuse of failure to exercise care." Schlauder v. Chicago & SO. Trac. Co., 253 Ill., 154.

Counsel for appellee, while conceding the authority of this court to reverse the judgment of a trial court without remanding the cause, upon the ground that the verdict of a jury lacks support in the evidence or is against the manifest weight of the evidence, somewhat overstep the bounds of proper argument by suggesting that if such authority is so exercised in the case at bar, or in like cases, legislative action may be expected to be invoked to withhold such authority from the court.

No duty imposed by law upon this court is discharged with so grave a sense of responsibility as in its duty, in a proper case, to reverse the judgment of a trial court with a

finding of fact to be incorporated in the judgment of this court. Where, however, the duty of this court to enter such judgment is clear, as it is in the case at bar, a failure to perform that duty would be subversive of settled law.

In the absence of evidence tending to show that decedent was in the exercise of due care for his own safety, or proof of any facts or circumstances from which due care on the part of decedent for his own safety might properly be inferred, the judgment must be reversed with a finding of fact to be incorporated in the judgment of this court.

JUDGMENT REVERSED WITH
FINDING OF FACT.

FINDING OF FACT:

We find that the injuries which resulted in the death of appellee's intestate were occasioned by his failure to exercise due care for his own safety.

21 - 18903.

DOROTHY BROCKHAUS, an infant, by MARGARET A. BROCKHAUS, her next friend, Defendant in Error, vs. AGNES B. GARNER, Plaintiff in Error,	WRIT OF ERROR TO MUNICIPAL COURT OF CHICAGO.

188 I.A. 560

MR. PRESIDING JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

On August 17, 1912, Dorothy Brockhaus, an infant, by Margaret A. Brockhaus, her next friend, instituted an action of the fourth class in the Municipal Court to recover damages for personal injuries alleged to have been occasioned by the negligence of the defendant. A statement of claim and demand for a jury trial were filed on behalf of the plaintiff, and on August 23, 1912, the defendant entered her general appearance and moved the court to require the plaintiff to file a more specific statement of claim. This motion was allowed and plaintiff was ruled to file a more specific statement of claim within five days, and defendant was allowed ten days within which to file her affidavit of merits. On August 26, 1912, a more specific and sufficient statement of claim was filed on behalf of the plaintiff, but defendant failed to file her affidavit of merits, and on September 4, 1912, judgment was entered against her by default for her failure to file and for want of such affidavit of merits. On September 10, 1912, the defendant having failed to take any further steps in the case, a jury was impanelled to assess the damages of the plaintiff and proceedings appear to have been then had re-

sulting in a verdict and judgment against the defendant for $300 damages. Thereafter the defendant moved the court to vacate and set aside such judgment, which motion was overruled, and defendant then prosecuted this writ of error.

A motion interposed by plaintiff to strike the purported bill of exceptions from the record was reserved to the hearing. The portion of the record which purports to be a bill of exceptions is not a model, but it sufficiently presents for review at least three of the twenty-nine questions raised by the defendant, and said motion to strike will be denied.

The rules of the Municipal Court herein involved are properly preserved in the record.

Rule 16 provides, that in fourth class cases for the recovery of money only, the plaintiff shall file with his statement of claim an affidavit sworn to by the plaintiff, or his agent or attorney, showing the nature of his demand, and the amount due from the defendant, provided that in cases for unliquidated damages the plaintiff need not state in his affidavit the amount of damages claimed.

Rule 17 provides that in such cases the defendant shall file an affidavit sworn to by himself, his agent or his attorney, stating that he verily believes that the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, which affidavit shall be filed with the defendant's appearance, provided that upon good cause shown the time for filing such affidavit may be extended for such reasonable time as the court shall order, and further that, if the defendant fails to file an affidavit of merits, such as is required by the rules of the court, the plaintiff shall be entitled to judgment by default upon the plaintiff's affidavit of claim, or upon such further evidence as the court may require.

The affidavit accompanying plaintiff's statement of claim in this case is, in form, as follows:

"James M. Patano, being first duly sworn, on oath states that he is the agent of the plaintiff in the above entitled cause; that the nature of plaintiff's demand is as follows: for personal injuries as set forth in the above statement of claim."

It is urged that as an infant is without capacity to appoint an agent the affidavit of plaintiff's claim purporting to be made by an agent conferred upon the court no jurisdiction of the subject matter of the cause of action, or of the person of the plaintiff, and that no summons could properly issue against the defendant.

Defendant entered her general appearance in the case and thereby submitted her person to the jurisdiction of the court, even in the absence of any summons. The informality, if any, in the affidavit to plaintiff's statement of claim did not operate to deprive the court of jurisdiction of the subject matter of the cause of action. The affidavit might properly have been amended and doubtless would have been so amended, or a more formal affidavit filed, if defendant had raised the question in the court below. Insufficiency of the affidavit of plaintiff's claim cannot be first raised after verdict and judgment, to defeat a recovery upon a cause of action of which the court has jurisdiction of the subject matter. After the entry of appearance by defendant the judgment by default upon her failure to file an affidavit of merits within the time limited was irregular. Judgment should have been nil dicet or for want of plea. The irregularity, however, in this respect does not require a reversal of the judgment upon the merits. Mann v. Brown, 263 Ill., 394.

There is no error in the record of which defendant can complain to defeat the judgment, and the judgment is affirmed.

JUDGMENT AFFIRMED.

March Term, 19_3 No.

54 - 19040.

HARRY M. ENGLESTEIN and LOUIS ENGLESTEIN, Co-partners, doing business as HARRY M. ENGLESTEIN & CO.,
Plaintiffs in Error,

vs.

WILLIAM BARTHOLOMAE and FREDERICK BARTHOLOMAE,
Defendants in Error.

188 I.A. 562

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the Municipal Court by plaintiffs in error against defendants in error to recover real estate brokers' commissions. A trial by the court resulted in a finding in favor of defendants in error and judgment against plaintiffs in error for costs.

It is insisted that the finding of the court is against the manifest weight of the evidence.

~~It is uncontroverted that~~ in May, 1913, defendants in error agreed in writing through plaintiffs in error as their brokers to sell for $12,000 their property, then being operated as a "nickel theatre", to one Stone, who contemplated associating with him in the purchase of the property, Charles Benesch and George Paul; that defendants in error then agreed to pay plaintiffs in error a commission of 2½%; that the contract was not signed by Stone, because he was unable to complete satisfactory negotiations with Benesch, and was unable personally to raise the required cash payment of $5,000; that shortly thereafter plaintiffs in error informed defendants in error that they believed they could sell the property for $12,500, and in that event they should have an additional commission of $300; that plaintiffs in error were informed by Stone that

Benesch was a prospective purchaser, and thereupon they interviewed Benesch and arranged a meeting between defendants in error and Benesch to negotiate for the property; that plaintiffs in error accompanied Benesch to the place of business of defendants in error and then introduced Benesch to defendants in error as a prospective purchaser; that that was the first occasion upon which Benesch had ever personally met or "talked business" with defendants in error; that on several occasions thereafter plaintiffs in error interviewed defendants in error and were informed by the latter that they were not ready to close a deal; that on July 18th following defendants in error without the knowledge of plaintiffs in error sold the property to Benesch for $13,500, and refused to pay plaintiffs in error any commissions on said sale.

There is some pretense on the part of defendants in error that one, Moss, was the procuring cause of the sale to Benesch. Benesch was a retail grocer and Moss was a salesman of groceries, with whom Benesch had transacted considerable business and in whom Benesch had confidence. The evidence tends to show that on one evening prior to the purchase of the property by Benesch he stood with Moss for about 15 minutes on the sidewalk on the opposite side of the street from the property for the purpose of observing the amount of patronage the "nickel theatre" business conducted by defendants in error was enjoying. This was the extent of Moss' relation to the transaction. Paraphrasing what is said in Rigdon v. Moore, 236 Ill., 382: Where a broker has been employed by the seller to find a purchaser for the property and through his efforts the seller has been brought into communication with the purchaser, the broker cannot be deprived of his commissions, because the seller takes up and completes the negotiations himself, or through another party. The court there also quotes with approval what was said in Hafner v. Herron, 165 Ill., 242,

as follows:

"Nor is it always necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively that the purchaser was induced to apply to the owner through the instrumentality of the broker or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker or through information derived from him. (Suesdorf v. Schmidt, 55 N. Y. 319; Stewart v. Mather, 32 Wis. 344; Lincoln v. McClatchie, 36 Conn. 136.) It is also true that where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions. Stewart v. Mather, supra." See also Rounds v. Victoria Hotel Co., 184 Ill. App., 500.

The evidence adduced in this case clearly demanded a finding in favor of plaintiffs in error for at least 2½ per cent upon the amount of the sale, and a contrary finding can not be sustained.

The evidence bearing upon the question whether or not defendants in error agreed to pay to plaintiffs in error an added commission of $300 if the property was sold for $12,500, is closely conflicting, and we express no opinion as to the probative force of the evidence upon that question.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

March Term, 1913, A.D.

94 - 19089.

JAMES B. MADSEN, Plaintiff in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
N. B. CORDELL, Defendant in Error.	)	OF CHICAGO.

188 I.A. 564

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the Municipal Court by J. B. Madsen, doing business as J. B. Madsen & Company, against N. B. Cordell to recover a balance of $199.48, alleged to be due for certain trade fixtures and certain extras sold and delivered to the defendant for the equipment of a butcher shop. Defendant filed his affidavit of merits wherein he claimed a set-off by reason of the failure of the plaintiff to furnish a sufficient ice box and the refusal of the defendant to accept the ice box furnished by the plaintiff. A trial by the court resulted in a finding in favor of the defendant upon his claim of set-off and judgment against plaintiff for $83, to reverse which judgment the plaintiff prosecutes this writ of error.

On June 24, 1912, defendant in error gave to plaintiff in error an order partly printed and partly in writing as follows:

"Terms
Cash on delivery.
J. B. Madsen & Co.
No. 839. Date Sold 6/24/12.
Sold to N. B. Cordell
Town and State. 152-4 S. 44th Ave.
Delivery July 3rd, 1912. Salesman Banks.
1 10'-0 Counter 24" Marble top Marble base Tile front and ends
1 8-0 Counter the same as above.
2 30x30 Meat Blocks.
1 18-0 Meat Rack.
3 Window Rails Bent 8'-2" Each.

1 14'-0x8'-0x10'-0 Meat Box Tile front Marbée Base with 5'-6" Partition including door on North end of Box 3'-6" Partition on South end of Box 5'-0 of South end of box to be finished all cornice to extend to ceiling all expose wood to be oak Mirror in center door. 540.00
Light finish.
(Signed) N. B. Cordell."

The ice box designated in the order included as the "Meat Box" was not installed ready for the reception of ice until July 12th or 13th, 1912, and some extras necessary for the proper equipment of the ice box were not supplied and installed until August 19, 1912. On July 18, 1912, defendant in error paid plaintiff in error on account $400. It is conceded that the charge for the ice box, which was included in the total amount of $540 stated in the original order, was $282. The ice box was manufactured by plaintiff in error in his factory in sections and was so delivered on the premises of defendant in error, where the several sections were united and the doors and partitions installed by the employees of plaintiff in error.

It is uncontroverted that after defendant in error commenced to use the ice box for the storage of meat the lowest temperature obtainable was from 44 to 54 degrees, and that the temperature required for the proper preservation of meat is from 38 to 40 degrees. It is further uncontroverted that on August 20, 1912, defendant in error observed a crack or opening 1-1/16 inches in width in the rear of the ice box, occasioned either by the separation of the sections forming its construction, or the coming apart of the matched flooring of which the several sections were constructed. The evidence tends to show that the ice box was wholly inefficient to serve the purpose for which it was designed, and that defendant in error repeatedly complained to plaintiff in error of the failure of the ice box to maintain the proper temperature and of the defective workmanship and material resulting in the

openings or cracks in the rear of the ice box and of its defective condition in other particulars, and that plaintiff in error disregarded such complaints and made no attempt to remedy the defects complained of. On September 20, 1912, defendant in error removed the ice box from his butcher shop to the rear of his premises and refused to accept the same upon his order therefor.

The rule is that, "Where a manufacturer contracts to supply an article which he manufactures for a particular purpose designed by the buyer and known to the vendor, so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the purpose to which it is to be applied." Fuchs & Lang Co. v. Kittredge & Co., 242 Ill., 88; Edwards v. Dillon, 147 Ill., 14; Seitz v. Brewers Ref. Mach. Co., 141 U. S., 510. See also Oil Well Supply Co. v. Watson, 168 Ind., 603, and note on same case in 15 L. R. A. (N. S.), 868.

It is insisted on behalf of plaintiff in error that there was an acceptance by defendant in error of the ice box in question, 1st, by his several receipts for the various portions of the ice box, as being in good order when they were delivered at his shop, and by the several "O.K.'s" by defendant in error upon time cards which plaintiff in error required his mechanics to furnish in order that they might receive credit for the time employed by them in the performance of their work; and, 2nd, by his having used the ice box from the time it was installed in his shop in July or August, 1912, until September 20, 1912.

On July 9, 1912, there was delivered at the shop of defendant in error by a teamster of plaintiff in error fragments of the ice box consisting of one partition and door and one partition with tile, and on July 10, 1912, there was

delivered in like manner the several sections of the ice box, and in each instance defendant in error signed a receipt therefor following an enumeration of the articles delivered, as follows: "Received the above goods in good order."

Manifestly, the main purpose in procuring these receipts was to inform plaintiff in error that his teamsters had delivered the goods at their proper destination. No opportunity was given defendant in error to examine the several articles delivered and no examination then made by him of the several fragments of the ice box would have disclosed the efficiency of such fragments, when assembled, to properly perform the functions of an ice box such as was required for the purposes of his business. The "O.K." by defendant in error of the time cards of the employees of plaintiff in error is not of sufficient significance to merit discussion. It would be an unwarranted extension and application of the doctrine of estoppel to hold that defendant in error by signing the receipts and time cards mentioned was precluded from denying that he accepted the ice box as in conformity with the implied warranty by plaintiff in error.

Any use, however slight, of the ice box by defendant in error did not operate to prevent him from exercising his right to reject it on account of a breach of the implied warranty. Whether or not the ice box would maintain the necessary degree of temperature was not determinable until it was used and tested, and when the first complaint was made by defendant in error respecting the failure of the ice box to maintain the necessary degree of temperature, he was assured by plaintiff in error that a further continued use of the ice box would remove the cause of complaint. Defendant in error had a reasonable time within which to reject the ice box after it had failed to comply with the implied warranty, and in de-

termining what was such reasonable time all the circumstances, the conduct of plaintiff in error, and what he said and did, were proper to be taken into consideration by the court. Dorrance v. Dearborn Power Co., 233 Ill., 354; Underwood v. Wolf, 131 Ill., 425. The question involved was one of fact for the court and upon this record was not improperly determined in favor of defendant in error.

In the case of Wolf Company v. Monarch Refrigerating Co., 252 Ill., 491, relied upon by plaintiff in error, the contract provided that the machine should be accepted or rejected at the end of the test period of ten days, and the machine was thereafter used by the defendant and such use was held to constitute an acceptance under the contract. The case is not in point.

As the finding and judgment of the trial court accomplish substantial justice between the parties, under settled rules of law, there is no occasion to consider other questions raised and discussed by counsel.

The judgment is affirmed.

JUDGMENT AFFIRMED.

March Term, 1913, No.

117 - 19113.

188 I.A. 567

WHITE OAK COAL COMPANY, Defendant in Error, vs. JOHN WORTHINGTON, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

188 I.A. 567

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The White Oak Coal Company brought suit in the Municipal Court against John Worthington to recover $679.11 for coal delivered at and consumed in heating an apartment building owned by the defendant. One Ebbert, a coal salesman employed by the plaintiff, was a tenant of the defendant for the term of one year beginning May 1, 1910, at a rental of $60 a month, payable in advance. Ebbert paid the rent for May, June and July, 1910, in cash, and thereafter until December 12, 1910, at his solicitation, the defendant accepted coal for the rent accruing to February 1, 1911. This coal was procured by Ebbert from Thos. W. Gilmore & Co. and delivered at the building. In the latter part of January, 1911, defendant directed Ebbert to fill up the basement of the building with coal, and Ebbert communicated this order to the book keeper or local manager of the plaintiff and plaintiff delivered the coal in question during February and March, 1911. During this time Robert F. Schenck or Robert F. Schenck & Co. were the rental agents of defendant for the apartment building, and the charges for the coal so delivered were entered upon the books of the plaintiff against R. F. Schenck & Co., and the two invoices for said coal, bearing date March 1, 1911, and April 1, 1911, respectively, were made out as follows:

"Sold to.....R. F. Schenck, Agt.
Delivered.....J. Worthington Bldg.
45th & Drexel Address 100 Washington St."

Statements of the coal delivered were sent by the plaintiff to Schenck and by him were sent to the defendant. Ebbert vacated the apartment at the end of his term on May 1, 1911, without having paid the rent for February, March and April, amounting to $180.

The position assumed by the defendant is that he incurred no personal liability to plaintiff for the coal; that his direction to Ebbert to procure the coal was made in compliance with an agreement between them that Ebbert should pay his rent in coal to be purchased or procured by him upon his own credit.

Upon a trial of the cause by the court without a jury there was a finding and judgment against defendant for $499.11, the full amount of plaintiff's claim, less $180, being the amount of rent due from Ebbert to the defendant. To reverse this judgment the defendant prosecutes this writ of error and the plaintiff assigns cross errors questioning the propriety of the action of the court in allowing to defendant as a credit upon plaintiff's claim the rent due from Ebbert.

Ebbert testified that upon the occasion in January, 1911, when he was directed by the defendant to procure the coal in question, he told the defendant that he (Ebbert) could only sell defendant coal where the purchase was made direct from the plaintiff. He further testified that during the summer of 1911, and after he had vacated the building on May 1, defendant demanded payment of rent from him and wanted to know why he didn't pay his rent; that he told defendant he didn't have the money, and defendant said he would refuse to pay plaintiff's bill until he (Ebbert) paid defendant.

Defendant testified that in January, 1911, Ebbert was in arrears for several months in the payment of his rent and that his direction to Ebbert to procure the coal in ques-

tion was given upon an express agreement with Ebbert that the coal should be procured by him upon his own credit and delivered to and received by defendant in payment of the rent due and to become due from Ebbert. Defendant is manifestly mistaken in so testifying. It is clearly established by the evidence that on December 12, 1910, Ebbert paid his rent in full, including rent for January, 1911, and that upon the occasion in January, 1911, when defendant directed him to fill up the basement with coal Ebbert was not indebted to defendant in any amount for rent. Furthermore, as Ebbert's lease of the apartment expired May 1, 1911, and only rent to the amount of $180 could accrue for the remainder of his tenancy, it is inconceivable that defendant, acting in good faith, would have directed Ebbert, upon his own credit, to procure a sufficient amount of coal to fill up the basement, at an approximate cost of $700.

There is no pretense by defendant in this case that the coal delivered to his building was inferior in quality or that the price charged therefor by plaintiff was unreasonable, and it is conceded that the coal was used for heating the building.

The denial by defendant of any liability to plaintiff is mainly predicated upon the claim that with knowledge of the fact that defendant was the principal and Schenck was his agent, plaintiff gave credit for the coal in question exclusively to such agent, and thereafter brought suit in the Municipal Court against such agent to recover the purchase price of said coal, in which suit there was a finding and judgment against the plaintiff.

If competent evidence of any such finding and judgment of the Municipal Court was offered upon the trial, such evidence does not appear in the abstract prepared and filed

by defendant, and in this case we are not disposed to undertake a search of the record for the purpose of discovering evidence which the rules of this court, and the well settled practice in the courts of review in this state, require to be presented for consideration in an abstract of the record. Inman v. Miller, 234 Ill., 336; Love v. Dick, 177 Ill. App., 98; Salisbury v. Deutsch, 178 Ill. App., 633.

Neither the fact that credit in the first instance was given to Schenck, the agent of defendant, nor the fact that plaintiff first commenced an action against said Schenck can be deemed conclusive of an election by plaintiff to discharge the defendant as the principal. Ferry v. Moore, 18 Ill. App., 135; Laguna Valley Co. v. Fitch, 181 Ill. App., 607; Mussenden v. Raiffe, 131 Ill. App., 456; Ketterstrom v. Peerless Portland Cement Co., 133 Ill. App., 579. See also case note to Murphy v. Hutchinson, 31 L. R. A. (N. S.), 786. Upon the record as here presented for review further discussion of the question is unnecessary.

The finding by the trial court that defendant was primarily liable to plaintiff for the coal sold and delivered is sustained by the evidence, but such finding is wholly irreconcilable with the further finding that defendant was entitled to a deduction from the amount of such liability of $180 due him from Ebbert for rent, in the absence of any proof even tending to show that plaintiff consented to or acquiesced in the allowance of such deduction.

The judgment will be reversed upon the cross errors assigned by the defendant in error and judgment will be here entered in favor of defendant in error and against plaintiff in error for $679.11 damages and costs of suit. The costs will be taxed against plaintiff in error.

JUDGMENT REVERSED AND
JUDGMENT HERE.

March Term, 1913, No.

194 - 19198.

188 I.A. 573

SAM FRANKENSTEIN, Defendant in Error, vs MAX WEBER and DAVID WEBER, Co-partners as WEBER BROTHERS, Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

188 I.A. 573

MR. PRESIDING JUSTICE BAUM DELIVERED THE OPINION OF THE COURT.

This suit was instituted in the Municipal Court by defendant in error against plaintiffs in error to recover a balance of $196.98 alleged to be due for goods, wares and merchandise sold and delivered. Upon a trial by the court there was a finding and judgment against plaintiffs in error for the amount claimed to be due as stated.

The record contains neither a correct stenographic report of the proceedings nor a correct statement of facts by the trial judge. What purports to be a correct statement of facts is merely a statement that certain witnesses testified to certain facts, in substance, as there stated in narrative form. The judgment might well be affirmed for failure to file a proper record. Kellogg v. City of Chicago, 176 Ill. App., 136; Schiavone v. Baddo, 179 Ill. App., 91.

The evidence, however, in the record as presented tends to show an original promise by plaintiffs in error to pay for the articles furnished, and as a finding in favor of defendant in error upon that issue may properly be sustained, the judgment will be affirmed.

JUDGMENT AFFIRMED.

March Term, 1913, No.
220 - 19285.

HENRIETTA O. DANIELS, Defendant in Error, vs. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

188 I.A. 574

MR. PRESIDING JUSTICE BAUNE
DELIVERED THE OPINION OF THE COURT.

In a suit brought by defendant in error against plaintiffs in error in the Municipal Court to recover damages for personal injuries claimed to have been occasioned by the negligence of plaintiffs in error, a trial by the court resulted in a finding and judgment against plaintiffs in error for $350.

The amended statement of claim filed by defendant in error December 12, 1913, alleges that the injuries complained of were sustained on January 23, 1911. In their affidavit of merits filed by plaintiffs in error they deny that defendant in error sustained the injuries complained of on or about January 23, 1911, and aver that on or about December 31, 1909, defendant in error was a passenger on one of the trains of one of the plaintiffs in error and in alighting therefrom she slipped and fell, and further aver that any cause of action that may have accrued to her by reason thereof is barred by the statute of limitations.

The only question presented for review is that arising upon the claim of plaintiffs in error that the cause of action is barred by the statute of limitations, and it is insisted that upon this issue the finding of the trial court is clearly against the weight of the evidence.

In this State it is held that the Statute of Limita-

tions is an affirmative defense, and that the burden of proving it is on the party pleading it. Schell v. Weaver, 325 Ill., 150.

It would serve no useful purpose to review and discuss in detail the evidence bearing upon this issue. We have carefully examined and weighed the same as it appears in the record, and find it inextricably conflicting. We cannot say that the conclusion arrived at by the trial court is palpably wrong.

The judgment is affirmed.

JUDGMENT AFFIRMED.

March Term, 1913, No.
285 - 19391.

FRANZ KOCH, FRANK J. KOCH, JOHN A. RICHERT and ARNOLD BRAUTIGAM, doing business as KOCH & COMPANY,
Appellants,

vs.

JOHN H. SUDERSKI,
Appellee.

188 I.A. 575

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

188 I.A. 575

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

This is a suit in assumpsit by appellants against appellee instituted in the County Court, wherein appellants filed their declaration consisting of the common counts, and attached thereto their affidavit of claim. Appellants also filed a bill of particulars. Appellee filed an affidavit of merits and a verified claim of set-off, to which claim of set-off appellants pleaded the general issue, accord and satisfaction and the five year statute of limitations. In this state of the record a jury was empanelled, whereupon before the introduction of any evidence, and again at the close of the evidence for appellants and at the close of all the evidence the attention of the court was directed by appellants to the fact that appellee had neither pleaded the general issue nor replied to appellants' plea of accord and satisfaction and the statute of limitations to appellee's plea of set-off. The trial court overruled appellants' motion for a peremptory instruction upon the pleadings filed and without requiring appellee to join issue thereon submitted the case to the jury for their verdict. The jury returned a verdict for appellee upon his plea of set-off and assessed his damages against appellants at $245, and judgment was entered on such verdict.

Appellee admits the informality and irregularity of the proceedings, but insists that appellants waived the neces-

sity of formal pleas by going to trial upon the merits and in support of such insistence cites numerous authorities announcing the well settled rule that a party having proceeded to trial without objection, as upon issues joined, cannot after verdict or for the first time in a court of review be permitted to take advantage of the failure of the opposite party to file proper pleas. These authorities have no application to the instant case, wherein the record discloses that appellants made timely and repeated objections in the trial court to the procedure adopted.

The judgment is reversed and the cause remanded for further proceedings upon issues to be properly joined.

REVERSED AND REMANDED.

March Term, 1913, Mr,

313 - 19324.

S. D. RYAN, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
THOMAS E. McARDLE, Appellant.	)	OF CHICAGO.

188 I.A. 584

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

In a suit instituted in the Municipal Court by S. D. Ryan against Thomas E. McArdle to recover installments of rent from October 1, 1906, to September 1, 1910, alleged to be due by the terms of a certain lease, a trial by the court resulted in a finding and judgment against the defendant for $1,845, to reverse which judgment he prosecutes this appeal.

A former suit by appellee against appellant to recover $795.53 salary and installments of rent alleged to be due under the terms of the same lease from September 1, 1905, to October 1, 1906, brought in the County Court, resulted in a verdict and judgment against appellant for $472.50, from which judgment he prosecuted an appeal to this court, where said judgment was affirmed. Ryan v. McArdle, 159 Ill. App.,579.

The lease in question is set out in the opinion of the court on the former appeal, reference to which is here made. The proceedings in the former suit are incorporated in the statement of claim filed by appellee in the instant suit and the complete record in the former suit, including the opinion of this court on the former appeal and the mandate of this court affirming the judgment in said former suit, were introduced in evidence in this suit by appellee.

The bill of particulars filed by appellee in the former suit is as follows:

"Salary and rent from September 1, 1905, to January 6, 1906.....$630.00
Rent from January 6, 1906, to October 1, 1906... 660.00
$1,290.00

Credit.

By cash on account.....$494.48
Balance due on October 1, 1906.....$795.52"

The principal claim of appellee in the present suit is stated in his statement of claim filed herein as follows:

"Par. 15. That after the beginning of this (the) suit in the preceding paragraphs mentioned (being the former suit in the County Court) there has accrued due to the plaintiff from the defendant as rent under the agreement herein and in said sum pleaded rent at the rate of $75 per month from the first of October, 1906, to the 30th of August, 1910, 47 months, making an aggregate of $3,525.00.

"Par. 16. That the plaintiff has received as a credit on said $3,525.00, by re-renting the premises in said agreement leased for the account of said defendant sums aggregating $1,680.00, and no more, as follows, viz.:
"From 1st of October, 1906, to 30th of September, 1907, at $50 per month.....$1,200.00
"From August 26, 1909, to February 25, 1910, at $30 per month..... 180.00
"From February 26, 1910, to August 26, 1910, at $50 per month..... 300.00
$1,680.00
Leaving a balance of $1,845.00 due the plaintiff."

In the affidavit of merits filed by appellant he avers, as grounds of defense to the whole of appellee's demand, that on or prior to October 1, 1906, appellee, without notice to appellant, entered upon the premises mentioned and again re-possessed himself of the same; that said entering upon said premises by appellee on or prior to October 1, 1906, was not done with the knowledge or consent of appellant and was not done under the terms of the agreement in writing, set forth in appellee's statement of claim; that the said action of appellee in entering into and upon said premises and re-possessing himself of the same amounted to a termination of tenancy which might theretofore have existed by virtue of said agreement in writing; that without the knowledge or consent of appellant

or without any notice to him, appellee has from and since October 1, 1906, been and remained in possession of said premises, either personally or by his agent or tenant, and that such act and acts upon the part of appellee so done without the consent or knowledge of appellant amounted to and was an eviction of appellant from said premises, and that thereby any and all right to demand rent of appellant which may have existed prior to such eviction, ceased and terminated.

As a separate and further defense appellant avers that on October 6, 1906, he was by appellee impleaded in a certain suit in the County Court of Cook County, being the proceeding particularly mentioned in appellee's statement of claim; that in such suit or proceeding appellee sought to recover from appellant for rent for the said premises for the period from January 6, 1906, to October 1, 1906; that in said suit so commenced in said County Court, appellant appeared and defended said cause, and that one of the defenses made by appellant to said suit was that appellee had, on January 6, 1906, evicted appellant from said premises by entering into possession thereof and exercising acts of ownership and of possession over the same, and that said defense was successfully made by appellant in said suit in said County Court and appellee did not recover from appellant for rent for said period from January 6, 1906, to October 1, 1906, and that thereby it became res judicata as between appellee and appellant that appellant had been evicted from said premises by appellee.

Relative to the first ground of defense set forth in appellant's affidavit of merits, it is insisted that as the lease in question was made in Iowa and in reference to premises there situate, it must be construed in accordance with the law of Iowa; that it is settled law in Iowa that if a tenant abandons premises and the landlord enters into possession and rents the same, without notice to the tenant that he is renting for the account of the tenant, a surrender of the premises is established and the lease terminated.

This insistence might well be dismissed without further consideration because the law as it is claimed to exist in Iowa was neither alleged as a ground of defense nor proved upon the trial. Indeed, there is no suggestion in the record that this precise question was raised in the court below. The laws of other states are required to be pleaded and proved in the courts of this state as facts. Edwards v. Schillinger, 245 Ill., 231; Leathe v. Thomas, 218 Ill., 246; Colozza v. Iowa Central Ry. Co., 182 Ill. App., 39.

It is clearly established by the evidence that upon the refusal of appellant to take possession of and use the premises under the lease, appellee notified appellant that he would not cancel the lease, but would hold appellant liable

for rent thereunder. In this state of the record, a re-renting of the premises by appellee, thereby minimizing the damages for which appellant would be liable, would not under the rule announced in the Iowa cases cited by appellant, operate as a surrender and termination of the lease. Brown v. Cairns, 107 Iowa, 727; Armour Packing Co. v. DesMoines Pork Co., 116 Iowa, 723.

The separate and further grounds of defense relied upon by appellant are embodied in the second, third, fifth and sixth propositions submitted by him to the trial court to be held as the law of the case, and the action of the court in refusing said propositions is assigned for error.

The said propositions are as follows:

"2. The court holds, as a proposition of law, that under the evidence herein, the lease between the plaintiff and the defendant, set forth in plaintiff's statement of claim, was terminated by the plaintiff by his act of re-renting the premises described in said lease on the 6th day of January, 1906."

"3. The court holds, as a proposition of law, that under the evidence herein, the lease between the plaintiff and the defendant, set forth in plaintiff's statement of claim, was terminated by the plaintiff by his act of re-renting the premises described in said lease on the 26th day of August, 1909."

"5. The court holds, as a proposition of law, that having impleaded the defendant in a certain cause in the County Court of Cook County, Illinois, on the 15th day of October, 1906, the same being the cause of action particularly mentioned in plaintiff's statement of claim, and the plaintiff having failed to recover from the defendant in said cause in said County Court for rental of said premises for the period from January 6, 1906, to the 30th day of September, 1906, the judgment entered in said cause in the County Court became in effect res adjudicata, as between the plaintiff and the defendant, that the lease mentioned in plaintiff's statement of claim in this cause was terminated by the action of the plaintiff on the 6th day of January, 1906."

"6. The court holds, as a proposition of law, that the judgment of the County Court of Cook County, Illinois, in the cause particularly mentioned in plaintiff's statement of claim in this cause was not res adjudicata as between the parties to this cause, to the effect that the lease set forth in plaintiff's statement of claim herein was and is in full force and effect."

An examination of the record and proceedings in the former suit including the opinion of this court upon the former appeal disclose that the recovery there had by appellee against appellant was for rent only, for the period from Sept. 1, 1905, to Oct. 1, 1906. The amount of the verdict and judgment in the former suit so closely approximates the rent which accrued during that period, less the amount received by appellee as rent up to Oct. 1, 1906, from other parties to whom he re-rented the premises after appellant had refused to take possession of the same under the lease, as to make it apparent that such verdict and judgment were intended to cover the unpaid rent for the entire period involved.

The judgment in the former suit is, therefore, res judicata that said lease was not terminated on January 6, 1906, by the act of appellee in re-renting said premises. Marshall v. Grosse Clothing Co., 184 Ill., 441; Manhattan Co. v. Aversz, 180 Ill. App., 470. The second proposition was properly refused.

There is neither pleading nor evidence upon which to predicate the third proposition, and it was, therefore, properly refused.

A discussion of the fifth and sixth propositions submitted by appellant and refused by the court would necessitate merely a repetition, in substance, of what has been heretofore said relative to the second proposition refused by the court. Both propositions were properly refused.

The judgment in the former suit is res judicata as to the essential questions raised on this appeal.

The judgment is affirmed. The cost of the additional abstract prepared and filed by appellee will be taxed to appellant.

JUDGMENT AFFIRMED.

March Term, 1913, No.

341 - 19355.

188 I.A. 586

ESTHER BERENZWEIG, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT
ABE KRECUN, Appellant.	OF CHICAGO.

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

This is a suit instituted March 18, 1913, in the Municipal Court by appellee against appellant to recover damages for alleged breach of promise of marriage, wherein a trial by jury resulted in a verdict and judgment against appellant for $300.

It is urged that the verdict is unsupported by the evidence; that the suit was prematurely brought; that under the pleading it was necessary for appellee to prove that she requested performance of the alleged marriage contract and that appellant refused to perform, and no such proof was made.

Appellee's statement of claim is as follows:

"For that whereas on or about the 15th day of January, 1913, in the City of Chicago, County of Cook and State of Illinois in consideration that the plaintiff, being then unmarried, had then and there promised the defendant, at his request, to marry him, when she, the plaintiff, should be thereto requested, the defendant promised the plaintiff to marry her, and the plaintiff avers that she, confiding in the said promise of the defendant has always from thence hitherto remained and still is unmarried and has been for all the time aforesaid and still is ready and willing to marry him. That although plaintiff, after making of said promise of the defendant on the day aforesaid, has requested the defendant to marry her, the defendant did not nor would he then marry the plaintiff, but refuses so to do, whereby the plaintiff has sustained damages to the extent of the sum of $5,000."

The affidavit of merits filed by appellant states his defense to the suit as follows: "That defendant never at any time promised to marry the plaintiff."

It is a fundamental rule in pleading that a material fact asserted on one side, and not denied on the other, is admitted. Simmons v. Jenkins, 76 Ill., 479; Hopkins v. Medley, 97 Ill., 402; Fowler Paper Co. v. Bert Jones Sales Book Co., 183 Ill. App., 310.

Under the pleadings the only material fact in issue was whether or not appellant had promised to marry appellee. Upon proof by appellee of such promise, her request to appellant to marry her and his refusal so to do, must be held to have been admitted by appellant.

The evidence introduced on behalf of appellee tends to show that in December, 1911, appellant promised to marry her in May, 1912, and that she expressed her willingness to then marry him. Appellant offered evidence tending to show that he did not so promise to marry appellee. Upon this issue the case was properly submitted to the jury, and we can not say their verdict was unwarranted. The facts and circumstances in evidence, other than the direct testimony of the parties, tend to corroborate the testimony of appellee, rather than the testimony of appellant.

That the suit was prematurely brought appears to have been raised by appellant for the first time in this court. The question is not properly preserved for review. Stitzel v. Miller, 350 Ill., 72.

Upon the record as made the judgment is affirmed.

JUDGMENT AFFIRMED.

March Term, 1913, No.
353 - 19367.

188 I.A. 588

JOHN F. DEVINE, Administrator of the Estate of WILLIAM LESAK, Deceased, Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
WARD BAKING COMPANY, successor to WARD-CORBY COMPANY, Appellant.	COOK COUNTY.

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

On March 1, 1911, William Lesak, aged 8 years and 3 months, was struck by an electric truck belonging to appellant and then being operated on Parnell avenue by a servant of appellant. The lad was thereby injured and taken to his home where he died about an hour thereafter. A suit brought by his administrator to recover damages for his wrongful death resulted in a verdict and judgment in the Circuit Court against appellant for $4,500.

The declaration contains two counts. The first count alleges that appellant (defendant) owned, operated and controlled a certain motor car, and by its servant and agent, was operating the same over, upon and along Parnell avenue; that it became and was the duty of appellant (defendant) in operating said car along said street, to use all proper care and caution in the running of said car, so as not to injure persons on said street; that appellant (defendant) did not regard its duty in that behalf, but on, etc., while appellee's (plaintiff's) intestate was lawfully on said street, and was in the exercise of proper care for his own safety, appellant (defendant), regardless of its duty in that behalf, and carelessly, negligently and wrongfully ran, operated and managed said car in so careless and negligent manner and at a high and dangerous rate of speed, so that by reason thereof appellee's (plaintiff's) intestate was run into, against, knocked down and run over by said car

in charge of appellant's servant and thereby so badly injured, that he died immediately thereto, as a direct result of said injuries.

The second count is similar to the first count, and also further predicates a right of recovery on the alleged negligent failure of appellant's servant to give proper warning to persons on the street.

At about 5 o'clock on the afternoon of the day mentioned from ten to twenty boys were playing marbles and tag or "it" on the sidewalks and in the roadway on Parnell avenue between 32nd and 33rd streets. The motor truck in question was used for the purpose of deliverying bread to the customers of appellant, and was then being driven by Robert J. Foelsch, whose regular route embraced the territory bounded on the south by 39th street, on the north by 31st street, on the west by Shields avenue and on the east by State street. Parnell avenue is two or three blocks west of Shields avenue. The delivery truck was equipped with a wooden enclosure having a glass front and glass sides. Foelsch, after delivering some bread at 31st and Armour avenue, drove west on 31st street to Parnell avenue and then north to 29th street for the purpose of conveying to his home there a salesman employed by appellant. Foelsch then started to drive to appellant's plant at 57th and LaSalle streets, and testified that he turned south on Parnell avenue at 31st street. As Foelsch was driving south on Parnell avenue between 32nd and 33rd streets, appellee's intestate, who had been playing on the west side of Parnell avenue, started to run across the pavement to the east side, and while so running was struck by appellant's delivery truck and injured. He was assisted to his home at No. 3241 Parnell avenue, where he died about an hour after he was injured. Foelsch testified that he did

not see the deceased upon the street, and did not realize that an accident had occurred until he felt a jar occasioned by one or both of the wheels on the west side of the truck passing over the deceased, and that he brought his truck to a stop within six or eight feet of the point where he saw the deceased getting up from the street. He further testified that he rang a bell continuously as he drove south on Parnell avenue from 32nd street; that it was then light; that the lamps on the truck were not lighted and that he was driving at a speed of about 4 or 5 miles an hour. He testified at the coroner's inquest that at the time he felt the jolt or thud he was running somewhere between 6 and 8 miles an hour. While there is a sharp conflict in the evidence as to the rate of speed at which the truck was then running, a preponderance of the evidence tends to show that no bell was rung or any other warning signal given as the truck ran south on Parnell avenue; that it was then getting dark and that the truck ran a distance of approximately 75 feet after it struck the deceased and before it was stopped. There is also evidence tending to show and the jury were not unwarranted in finding that at the time in question Foelsch was disregarding the law of the road by running the truck south on the east side of Parnell avenue.

Under the evidence bearing upon the issues of the negligence of Foelsch in driving and operating the truck and due care by appellee's intestate for his own safety, we are not justified in interfering with the verdict of the jury.

It is said by counsel for appellant that there is no evidence in the record that the death of appellee's intestate resulted from the injuries alleged in the declaration, and Jonnson v. Chicago City Ry. Co., 166 Ill. App., 49, is cited in support of appellant's insistence that the judgment

must be reversed for failure to make such proof. The Johnson case is not in point. In the case at bar, the identity of appellee's intestate as the person injured was clearly established by the evidence. True, the character and extent of his injuries were not shown, but the evidence discloses, as heretofore stated, that he died at his home within about an hour after he was injured. It appears to have been conceded by appellant upon the trial that appellee's intestate died as a result of the injuries occasioned by appellant's truck. In the course of his cross examination of a witness called by appellee, counsel for appellant referred to appellee's intestate as "the little boy who was killed, and upon his direct examination of Adolph Hermann, a deputy-coroner, counsel for appellant asked the witness whether he remembered holding an inquest on March 2, 1911, "upon the body of a boy who was killed by an automobile". Upon this record and from the evidence adduced the inference is irresistable that appellee's intestate died as a result of the injuries complained of in the declaration. In the Johnson case it is said:

> "If it be admitted that the person injured was William Peat, and that he died seven hours after the accident at a hospital, the inference would be very strong that his death was occasioned by the injuries received."

It is urged that the trial court erred in not admitting evidence offered by appellant tending to show that at the time of the accident, its driver, Foelsch, was not acting within the scope of his employment, nor in furtherance of his master's business, whereby appellant would be relieved of liability arising from the negligence, if any, of its said servant.

The witness, Foelsch, testified that after completing a delivery at 31st street and Armour avenue, he took Mr. Sleeth, a salesman employed by appellant, to his (Sleeth's) home, and

then started on his homeward trip to the bakery. He was then asked whether he had obtained appellant's permission to take Mr. Sleeth home, and an objection to the question was sustained. Counsel for appellant then offered to show by the witness "that on the day in question, after having completed the special delivery at 51st street and Armour avenue, and contrary to the instructions and directions of his employer, witness did not return to the plant of his employer, but proceeded upon a personal mission for himself, the mission being to take a friend home, the friend living at a point outside of the established route of the witness". Objection to the proof offered was sustained, presumably, as appears from the record and the statements therein of court and counsel, upon the ground that in the absence of a special plea, the plea of the general issue interposed by appellant admitted appellant's ownership and operation of the truck, and that the servant of appellant, was, at the time of the accident, engaged in operating the truck in the regular line of his duty and employment.

Notwithstanding the fact that counsel for both parties have argued this question at length, a determination of the question is not necessarily involved upon this record. It is conclusively established by the uncontroverted evidence that at the time of the accident Foelsch was engaged in driving the truck to the plant of appellant, as it was his duty to do in the regular line of his employment, after he had completed his work. If the accident had occurred while he was engaged in taking Sleeth to the latter's home, a different question would be presented.

It is suggested that it was error to admit proof that Foelsch was driving the truck south on the east side of the street and so disregarding the law of the road. The

record does not disclose any objection by appellant to such proof when made, but if timely objection had been made, it would have been of no avail. The allegations of the declaration with respect to the negligent operation of the truck are sufficiently broad to admit such proof in support of a substantive ground of recovery. But if this were not so, such proof would be admissible as bearing upon the question of the contributory negligence of appellee's intestate.

There is no substantial error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

October Term, A.D. 19.

395 - 18863.

CLARK AUBREY, Appellee, vs. CHARLES C. O'BYRNE, Executor of the Estate of JESSIE S. DONLEY, Deceased, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

188 I.A. 601

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit Clark Aubrey recovered a judgment of $1,924.04 against Charles C. O'Byrne, executor of the estate of Jessie S. Donley, deceased, appellant. The case was tried upon an agreed state of facts, in substance, that on November 13, 1908, Jessie S. Donley had on deposit to her credit with the Citizens State Bank of Big Rapids, Michigan, the sum of $1,924.04; that on that day she had been informed that she was about to die and could not recover, and she believed she was about to die; that the plaintiff, Clark Aubrey, was her nephew and her only heir at law, except her husband, William E. Donley; that she did not then know the exact amount of money she had in the said bank and she thereupon, on said date, executed her check in these words:

"No._____ Big Rapids, Mich., Nov. 13, 1908.
Citizens State Bank, Pay to Clark Aubrey or order $5,000 Dollars.

Jessie S. Donley."

She forthwith delivered said check to said Clark Aubrey without any valuable consideration therefor, and by the execution and delivery thereof she intended to assign to Clark Aubrey as a gift all her right, title and interest in said sum of money then on deposit in said bank to her credit; that about the same time she drew said check she also made her will in which no mention was in any way made of

said sum of money deposited in said bank, and said check was made and delivered in contemplation of her impending death; that within three hours after the execution and delivery of said check to said Aubrey she died; that said check was never previous to her death presented to said bank for payment or accepted by it at any time, and after her death it refused at all times to pay said check to said Aubrey; that appellant was on March 29, 1909, appointed executor of the estate of said deceased by the Probate Court of Mecosta County, Michigan, which said court had jurisdiction of probate matters in said county and state, and had jurisdiction of the said estate; and that appellant, as such executor, obtained said money from said bank and refused to pay the same to appellee on his demand therefor.

To an appropriate declaration filed by appellee under said facts, appellant plead the general issue and a special plea averring that it was the law of the State of Michigan that a check upon a bank, made and delivered by a donor, intended as a gift causa mortis, to the donee, where such check is not presented to or accepted by the bank in the lifetime of the donor, is no such delivery of the funds of the donor in the bank as to pass title thereto to the donee, and that the delivery of the check as aforesaid did not constitute a valid gift causa mortis of any of said funds of the donor, etc.

No proof whatever was offered in support of the special plea, by the agreed state of facts or otherwise. In the absence of averment and proof to the contrary, it must be presumed that the common law prevails in the State of Michigan, and that the decisions of the courts of Illinois embody a correct exposition of the common law as it prevails in the State of Michigan. Fartier v. Penn. Co., 18 Ill. App., 260; Mutual Life Ins. Co. v. Devine, 180 Ill. App., 442, and cases there cited; Crouch v. Hall, 15 Ill., 263.

Under the common law as interpreted by our Supreme Court the drawing of a check upon a banker by a drawer having funds in his bank operates as an assignment and transfer to the drawee of the legal title to so much of the fund on deposit as is named in the check, as between drawer and drawee; that in order to charge the bank with the amount of the check, it is necessary that the check be presented to it for payment, or some other act done equivalent thereto, and that it be shown that the drawer had at the time of presentment sufficient funds on deposit to pay the check. Bank of Antigo v. Union T. Co., 149 Ill., 343; Munn v. Burch, 26 Ill., 21; Cage Hotel Co. v. Union Nat. Bank, 171 Ill., 531.

If in this case the drawer, Jessie S. Donley, had drawn a check on the bank to appellee for the exact sum of her deposit, there could certainly be no question that under the said holdings it would have operated as an assignment and transfer to him of the entire deposit, with the other admitted facts considered that by such check she intended to assign and deliver the deposit to him as a gift causa mortis. The title to the deposit, too, would undoubtedly have been absolute in Aubrey and irrevocable by the executor after the death of the donor from the peril that induced the gift without revoking the gift. The delivery of the $5,000 check by said donor with the intent to transfer and deliver the deposit and no more, and as a delivery of that deposit whatever it might be and so mutually understood by drawer and drawee, should when considered with the other facts in the case be treated as a good and completed gift causa mortis. The delivery of the gift was a symbolical delivery, and just as complete and effective as if the donor had delivered to appellee her pass book with direction to the bank to pay all her deposit to him. It was accepted by appellee and the gift, though revocable by her

at any time before her death, was never revoked by Mrs. Donley. After the delivery of a gift causa mortis to the donee by a donor, and after death of the donor without revoking the gift, the legal representatives and heirs have no power or authority to revoke the gift.

Appellee could not maintain an action on the check in question against the bank on which it was drawn, because it was in excess of the drawer's deposit. Coates v. Preston, 105 Ill., 470.

The question, however, of whether or not appellee in his own name could recover against the bank, or whether or not the bank was liable on the check to appellee, does not determine the question of the liability of appellant to appellee. Appellant, as executor, took into his possession money rightfully belonging to appellee and the law implies a promise on his part to pay it to appellee. McDonald v. Brown, 16 Ill., 33; Varley v. Sims, 8 L. R. A. (N. S. , 828.

The courts in this country generally hold that a gift of a deposit book of a savings bank is a gift of the fund, and that such a gift may be valid as a gift causa mortis. Thorton on Gifts and Advancements (1893), Sec. 330, 331 and 334; 14 Am. and Eng. Ency. of Law (2nd Ed.), 1062.

The gift in such cases is upheld upon the theory that the delivery of the bank-book with intent to deliver the deposit is a good symbolical delivery of the deposit, sufficient to satisfy the demands of the law of gifts causa mortis with respect to delivery thereof.

Section 188 of our Negotiable Instrument Act, Hurd's Stat. 1911, p. 1609, is not applicable to this case, even if it should be held to change the common law rule that a check for the full amount, as between the drawer and drawee, is an assignment of the bank fund.

October Term, 1912. No.
417 - 18884.

188 I.A. 603

WILLIAM JUNGE, Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
SOUTH HALSTED STREET IRON WORKS, a Corporation, Appellant.	COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

This appeal is by South Halsted Street Iron Works to reverse a judgment of $6,000 against it in a personal injury suit brought by William Junge.

There is no controversy about the material facts as appellee and his witness, John Strong, the only witnesses in the case, testified to substantially the same state of facts. Their evidence strongly supports the second count of the declaration, and is, in substance, that appellee, a structural iron worker of twenty years experience, had entered the employment of appellant about six weeks prior to his injury on a school building under construction at Loomis and State streets, Chicago, by appellant, also engaged in operating a certain structural iron, steel and [illegible] plant. Appellee was known to be especially good in unloading structural iron and had been usually called on by appellant to aid and advise the to unload or assist in unloading the structural iron that had been delivered at that building. The iron that had been there on the cars was generally dry, because it had longer time in which to dry the paint applied to it. The iron that had been coming to the building in weeks and prior to appellee's injury been coming wet and slippery by reason of the fresh paint as it came direct from the shop after being painted. On Friday or Saturday before the injury on Monday, November 7, 1910, appellee made up his mind to quit the job if

the iron continued to come wet and slippery with paint, as it was dangerous to handle it in that condition, and he then told Mr. Berg, appellant's foreman at the building, that he was going to quit the job, unless the iron thereafter was dry when delivered for unloading. Mr. Berg replied: "Well, we will see. I will telephone and see that we get it remedied, so that we do not get any more stuff like that." Upon this promise being made appellee continued at his employment, and received his injury while unloading the very next load he undertook to unload after that promise was made to him. Appellee and Mr. Stream were directed by the same foreman, Mr. Berg, to unload the wagon in question. They accordingly went to the wagon and first removed a loose chain from around it, and looked at the iron or steel and touched it with their hands to see if it was dry and safe, and remarked to each other that it was dry and looked good. They then removed from the top of the load the small T-iron the paint on which was dry. The load of steel extended above the short stakes or standards on the bolsters of the wagon and above the wheels. Mr. Stream was looking for a bar to pinch off the heavy pieces while appellee got on top of some smaller irons piled on an elevated place by the side of the wagon to straighten them out so the heavy iron could be unloaded on top of them without bending any of the iron. While appellee was thus at work about four feet from the wagon and about opposite the hind wheels there was suddenly a slight jar or move of the wagon and at the same instant a large lintel about eighteen inches wide on its base and from fourteen to sixteen feet long "shot out from the load", and almost cut off one of his feet. Mr. Stream gave appellee warning just as the lintel started, but the warning was too late. The lintel in question was slightly tilted out of a horizontal position, and its broad face or bottom was faced up close against the face or bottom of a similar lintel. The

paint on the outside of those two lintels looked to be dry but their two faces that were touching each other were wet and slippery, because the paint had not been dried before they were loaded. The witnesses described them as "slippery as soap", and attributed the sliding of the lintel the distance it was thrown to that slippery condition, which overcame the friction that would otherwise have held them together. They were not able to say whether it was a move of the team or the movement of the lintel as it went out of the wagon that caused the sudden move or jar of the wagon.

It is first contended by appellant that appellee assumed the risk in this case, and that appellant's promise to remove the danger on appellee's complaint did not suspend the doctrine of assumed risk, because appellee was engaged in simple labor with simple appliances, and that the "simple tool rule" should be applied. The simple tool or simple appliance rule has no application to this case. The evidence showed that it was the custom of the trade for structural iron to be delivered in a dry condition before being unloaded and that the slippery and dangerous condition of the iron in question was not a usual and customary condition met with by those who unloaded it. The danger that caused appellee's injury was in the nature of a latent defect or danger. It was an extraordinary peril of the business in which appellee was engaged and arose from the alleged negligence of appellant, and appellee could not be held to assume it in the absence of a knowledge of the danger. Extra hazards which result from the master's failure to perform his duties to employes do not come within the risks which the latter assume as a part of their contract of service, until the employes obtain knowledge of the extra hazards to which they are exposed. U. S. Rolling Stock Co. v. Wilder, 116 Ill., 100; The Chic. H. and B. Co. v. Mueller, 203 Ill., 538.

Appellee prior to his injury became aware of the dangerous condition in which the iron was being delivered for unloading, and had he continued in the employment with such knowledge and without complaint the danger would have continued as an assumed risk to him. He, however, gave notice of the danger and of his intention to quit the job unless the danger was removed, and received the promise of the foreman that the danger would be removed. The evidence shows clearly that appellee relied on the promise and, therefore, continued in appellant's employment. The effect of that promise to remove the danger, that is, to have the iron delivered in a dry condition, was to relieve appellee from the assumption of that risk for a reasonable time thereafter, unless the danger was so imminent that no prudent person would encounter it. Morden Frog Works v. Fries, 228 Ill., 246.

Appellee was induced to rely on that promise, and the evidence shows further that he did rely on it and that he thought appellant had complied with its promise. The condition of the iron already unloaded and the appearance of all the outside or exposed parts of the load in question indicated that the promise had been complied with, and he had no notice or knowledge to the contrary. The evidence, therefore, entirely negatives the existence of any knowledge of the danger by appellee that caused his injury.

It is also urged by appellant that there is no evidence that the horses and wagon or the iron in question belonged to appellant, or that the driver was the servant of appellant. The horses and wagon were not the appliances of which complaint was made, and the driver was not even at the place or with his team and wagon when the injury occurred.

Appellant only filed the general issue to appellee's declaration and, therefore, the ownership of the instrumentalities complained of was admitted by the pleadings as the

declaration charges such ownership and control of the same. Chic. U. T. Co. v. Jerka, 227 Ill., 95.

The question of whether or not appellee was guilty of contributory negligence was submitted to the jury, and the verdict is well supported by the evidence. Appellant was also chargeable with notice of the wet and slippery condition of the iron by reason of the green paint thereon, although the foreman himself did not have actual knowledge of the condition of this load in question. Appellant had been given notice of the conditions of the loads complained of, and promised to see that no more iron should be delivered in that condition, and its loaders' knowledge, whoever they were, was knowledge or notice to appellant, and it was its duty to see that the iron was delivered in reasonably safe condition for unloading, as it had promised to do.

The jury were also justified in finding that the slippery condition of the iron was the proximate cause of appellee's injury. The evidence tends to show that the slippery condition of the iron overcame the friction of the two lintels that lay surface to surface, and that the friction would have held them together had they been dry, and that the one that slid off the wagon against appellee would not have been thrown so far and against appellee, if it had not been for the wet paint. It is argued that it was the moving or jar of the wagon that caused the lintel to suddenly shoot out of the wagon. It is not clear by the evidence that the wagon was moved or jarred otherwise than by the movement of the lintel itself. But the evidence does tend to show that the slippery condition of the lintel was an efficient cause of appellee's injury and that it would not have occurred but for such slippery condition. If an inanimate thing contributed with the negligence of appellant and appellant's negligence

was an efficient cause of the injury appellant is liable. Pullman P. C. Co. v. Laack, 143 Ill., 242.

Complaint is made of appellee's first instruction, because it directed the jury to find a verdict without taking into consideration the defense of assumed risk. The instruction might have been more satisfactorily drawn had it been based on the second count of the declaration which charged a complaint by appellee of the dangerous conditions in which the iron had been previously delivered, and a promise by appellant to remove that danger from future loads to be delivered. We do not think, however, that there is any reversible error in the instruction for the reasons assigned. In the first place, the evidence shows clearly that appellee had no knowledge of the dangerous condition of the load in question. He had examined it and found it was apparently a dry load, as he had been promised it should be, and there was no reason for him to believe otherwise. He could not know the condition of the two wet surfaces of the lintels until they were separated. The question of assumed risk was, therefore, not involved in the case, and it was not reversible error for the instruction, if otherwise correct, to direct a verdict without reference to the defense of assumed risk. Knox v. Am. R. M. Corp., 236 Ill., 437, affirming 140 Ill. App., 359.

In the next place, there is no dispute about the facts that appellee complained of the danger and had made up his mind to quit unless the danger was removed; that appellant promised to remove the danger and that appellee relied thereon and continued in the employment of appellant and believed at the very time of his injury that appellant had complied with its promise, and that the load was a dry load. By that promise appellant impliedly agreed that appellee should not be held to assume the risk for a reasonable time after such promise, which

reasonable time could upon no grounds be said to have expired. Swift & Co. v. O'Neill, 187 Ill., 337.

The instruction is not subject to appellant's other objection that it gives a wrong definition of proximate cause. The instruction in effect told the jury that, although some other agency was a contributing cause of the injury, yet if they believed that the slippery condition of the iron by reason of the green paint was also a proximate cause of appellee's injury, his recovery could not be legally defeated, because of the other concurring and contributing cause. Appellant overlooks the fact that the law recognizes that there may be two proximate causes of an injury which would not have occurred but for the joint existence of both of said causes, and in such a case both causes combined constitute the proximate cause of the injury. In such a case, if a defendant's negligence is one of such proximate causes, he is responsible for the injury. City of Joliet v. Shufeldt, 144 Ill., 403; Ford v. Hine Bros. Co., 237 Ill., 463.

There was no reversible error in the admission of evidence, as claimed by appellant, and the other errors assigned by it are waived because not argued. The judgment of the court, is, therefore, affirmed.

AFFIRMED.

October Term, 1912 No.

454 - 18925.

188 I.A. 607

E. J. HOLSLAG, doing business as HOLSLAG & COMPANY, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT
ROBERT H. MORSE, Appellant.	OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Robert H. Morse from appellee's judgment of $1,475.73 for a balance due under a contract for alterations and interior decorations in appellant's home.

The declaration is the usual form with the common counts only, accompanied by an affidavit showing that the claim was for a balance due of $1,475.73 on a final settlement made by appellee and appellant for work, labor and material furnished by appellee to appellant under a certain contract, a copy of which was attached to the declaration. Other items in the account were added, but they are eliminated from further consideration on this appeal, because they have been abandoned by appellee and were not allowed by the court. The trial was before the court without a jury.

After reading an abstract of about 300 pages of a record of over 1,400 pages, supplemented by briefs and arguments of more than 200 pages, we are able to state that the material facts applicable to appellee's claim, and about which there is practically no dispute, are, that on December 19, 1908, appellee and appellant entered into a written contract whereby appellee agreed to provide all the materials and perform all the work for the completion of all interior cabinet wood-work, and stone and mantel work in the music room, and all interior decorations and plain painting and art glass and lighting fixtures in the additions and alterations to the residence of

appellant for the contract price of $6,700. The work was completed by appellee in the latter part of July or August, 1909, and controversies then arose as to the amount to be paid therefor to appellee. Appellee claimed a balance due him of about $2,800 on the contract, having already been paid about $4,500, and claimed for extra work a further sum of $1,230. There were outstanding bills estimated at $1,475.72 due to sub-contractors. Appellant claimed that some of the charges for extras were covered by the original contract and that others of them were overcharges. On September 24, 1909, those controversies were settled by appellee and appellant by an agreement between them by which appellant was to pay appellee the sum of $2,576 on receipt from appellee of waivers of liens by the sub-contractors, and appellee's waiver of lien for all work, and a sworn statement to the effect that all bills for labor and material had been paid by him. The sub-contractors and the amounts due them, whose waivers of lien were to be thus obtained, were specifically mentioned and stipulated to be as follows:

Saumac Mfg. Co.	$556.00
Chicago Ornamental Iron Co.	130.00
Wilwarth Co.	347.32
Union Interior Co.	135.00
Orr & Lockett	276.90
Codenhead & Morrow	50.00
Total	$1475.72

Appellant drew his personal check on his bank payable to appellee in the sum of $2,576, and placed it in escrow in the hands of one Robert G. Owen to be delivered to appellee when he should deliver to appellant said waivers of liens and affidavit. Appellee was not able to secure the waivers from said sub-contractors because they claimed liens on the building for other claims due them from appellant, and appellee so reported to appellant. On September 25, 1909, in appellant's office appellee said to appellant, "Why isn't it just as well

if I give you the checks payable to those people and you give me the difference or balance that is coming to me." Appellant replied, "Well, that will be all right." Appellee then and there made out, signed and delivered to appellant checks payable to said several sub-contractors in the several amounts aforesaid amounting to $1,475.72, and also delivered to him his own waiver of lien and the affidavit aforesaid. Appellant then said to him, "How much do I owe you?" Appellee then figured by deducting the sum of all of his said checks from the $2,576 appellant was to pay him, and replied that appellant owed him $1,100.28. Appellant then said, "Are you sure you are not cheating yourself?" To that appellee replied, "I guess I know how to figure even if I don't sit in a big office." Appellant then drew his personal check to appellee for "$1,100.28 in full", signed it and delivered it to appellee. Appellee discovered his mistake a few days later and asked appellant to rectify it and pay him the balance of the $2,576 that appellant had agreed to pay him, or $1,475.72, but appellant refused, and made a claim to appellee that the work on his house was not done according to contract and that the circassian veneering on the wall of his music room had checked and split, and claimed damages therefor under the contract which guaranteed the work not to check or split within three years.

Appellee was clearly laboring under a mistaken idea when he accepted appellant's check in full of the amount due him, and, as appellant expressed it, cheated himself out of $1,475.72, which did not dawn on appellee until his said outstanding checks began to be presented to him for payment. It also clearly appears that appellant at the time he delivered appellee the check in full of all of appellee's claim knew appellee was in error and to put it in his own say knowingly allowed appellee to cheat himself. Appellee accounts for his error, testifying that he had been away shortly before on press-

ing business matters that were worrying him, and that he was laboring under some excitement owing to the long worry with appellant in getting the matters between them settled. We do not think it is very material as to what caused the mistake. The amount owed to appellee by appellant by their final agreement was stated to be $2,576 on appellee's paying said sub-contractors the said amounts due them, which would leave appellee net over and above the sum due the sub-contractors $1,100.08, the amount owed in the check of appellant.

After said final agreement was reached by the parties appellee's claim could not be longer regarded as an unliquidated disputed claim, and an acceptance of a less sum due him by the agreement in satisfaction thereof by mistake or oversight, which was well known to appellant, would not discharge the debt or claim in full. An acceptance by a creditor of a sum of money less than the amount due, even if done by agreement without further consideration, is a discharge of only so much of the debt as is thereby paid. The rule is otherwise where property other than money, or money and property, are taken in full satisfaction, or where the payment is the amount agreed upon in an honest compromise of unliquidated or disputed demands. Titsworth v. Hyde, 54 Ill., 486; Neal v. Hunsley, 116 Ill., 418; Haven v. Mass. Mut. L. Ins. Co., 125 Ill., 636; Bingham v. Browning, 197 Ill., 1[illegible].

It is not essential to the creditor's right of action that he rescind the contract of settlement or that he return the money or check received, but only that he give the debtor credit for the amount paid, where the creditor accepts a less sum than the amount due in full satisfaction of a liquidated and undisputed debt. Farmers & M. L. Ass'n v. Caine, [illegible]4 Ill., 5[illegible]; Reed v. Engel, 237 Ill., 6[illegible]8.

Appellant's claim that appellee can not recover on the common counts because the architect's final certificate was

not produced is untenable under the facts proved. Appellant asked the architect not to make such certificate and undertook to, and did, make a settlement of all disputes with appellee as to his claim. Where the owner asks the architect not to make such certificate, and makes payments and settles with the contractor without such certificate, the provisions of the contract requiring certificates are waived. Masek v. Chaelik, 169 Ill. App., 569; Vt. St. M. E. Church v. Brose, 104 Ill., 206.

Where a building contract has been fully performed and the final amount due agreed upon and it only remains to pay the balance due, the contractor may recover under the common counts, and the contract may be read in evidence for the purpose of showing its terms. Concord A. H. Co. v. O'Brien, [illegible] Ill., 360; Ashford v. Muldoon, 45 Ill., 195.

Substantial performance of a building contract is all that is required to enable the contractor to maintain a suit for the contract price. The owner is not in a position to deny substantial performance who accepts the work and has agreed upon a final settlement and payment therefor. Evans v. Howell, 211 Ill., 85; Concord A. H. Co. v. O'Brien, supra.

Appellant says in his brief, "There is no doubt that appellee made a mistake when the settlement was concluded on September 25, 1908." He also says that he does not mean that he shall be given just compensation in his claim for set-off, "and also be allowed to retain that which he received through the gross carelessness of the plaintiff on September 25th." This is a virtual admission of appellee's claim; and, yet, about one-half of his brief of one hundred and fifty-one pages is vigorously employed in an attempt to show that there was no final settlement of appellee's claim, that it still remains an unliquidated and disputed claim, and that appellee's receipt and retention of the check "in full" constituted an accord and satisfaction, and is an absolute bar to this suit.

Our conclusion is that he is right in his judgment that appellee's claim is a just one,, but in error in concluding that it was not a legal and binding obligation against him.

Appellant's plea was the general issue with notice of special matters of defense, payment, accord and satisfaction, release and breach of contract.

The specifications of the contract provided that the wood work in the music room should consist of wood veneer wainscoting eight feet and a half high and of the best quality of selected circassian walnut veneered on pine core, and all veneer work to be guaranteed for a period of three years "not to crack or show any defects whatever", "the entire wood work to be what is known as cabinet work of the highest grade."

The total veneered surface in that room is nearly 800 square feet, and the work was done by sub-contractor, F. C. Bauman Mfg. Co., for the contract price of $1,[illegible].50. The evidence of appellant tended to prove that in December, 1909, checks and cracks began to appear in the veneer, and that in January, 1910, those defects appeared in almost every sheet of veneer in the room in what is called the heart or center formed by the cross grain of the wood at the points where branches came out from the trunk of the tree, or in what is known as the "crotch of the tree"; that in some places the veneer came loose from the core to which it was glued, making a bulged or blistered appearance. On complaint of appellant to appellee, Bauman & Co. attempted to repair the defects, and the evidence shows that in three places the veneer was nailed, and that there were left visible nail heads and nail holes, and that the places repaired appeared to be polished and brighter than the balance of the finish.

Appellee's evidence merely tended to minimize the cracking and checking of the veneering, or rather to show that appellant had exagerated those defects. Appellee also

makes the claim that he is not responsible for the defects, because appellant and the architect selected veneering that would crack anyway, and that the architect ordered the sub-contractor to put on the veneering when the room was very damp and that the sub-contractor told the architect it would crack if put on while the room was damp and cold and that he would not be responsible if it did crack and check.

Appellant's evidence also showed clearly without being contradicted that gumwood, a rather cheap wood, was used for the floor moulding, and that some of the crown moulding was also gum wood, instead of circassian walnut as contracted for, and that a chestnut core was used in the veneer instead of a pine core, the costlier material; that in some of the panels there were a number of small plugs made of different kinds of veneer, making a bad appearance in the veneering; and that the panels and mouldings were joined in the corners with miter joints instead of tongue and groove work as is necessary in high grade work called for by the contract. Appellee's evidence, however, was to the effect that the panels and mouldings were tongue and groved in the corners.

We do not intend to discuss the merits of the evidence further than to say that we think it is very clear that the contract was violated in all the particulars named, i. e., that the work as repaired was not of the high grade of work that the contract called for, and that the materials called for in the particulars above mentioned were not furnished, and that the guaranty or warranty was broken. We have examined the contract carefully and find nowhere in it any power or authority given the architect to waive any provision in it in it's requirements as to the work or the materials specified. There are a few articles or materials that are not specifically defined that were to be selected by the architect, but there is no such provision as to the material and work complained of by

appellant. The contract specifically provides that no certificate of the architect, except the final certificate, shall be conclusive evidence of the performance of the contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials. There was no final certificate issued by the architect for the work in question. The specifications conclude with this provision:

"That the contractor will furnish all the labor and material and perform all the work as shown on the sketches and designs submitted and in accordance with the specifications attached hereto and made a part of this agreement according to their true intent and meaning, and to the satisfaction of owner and the architect. Entire work in this contract to be guaranteed for a period of one year, resulting from improper workmanship or defective materials."

The said settlement of the parties was only as to appellee's claim for amount due then on contract and for extras, and did not affect the right of appellant to recover for the breach of the contract and of the guarantee.

Appellant's claim is for unliquidated damages and hence is not properly a matter of set-off, strictly speaking, but may be recouped, i. e., he could mitigate or lessen appellee's claim, or entirely defeat it, if his evidence was sufficient, but he could recover no judgment for any excess in his favor. Appellant's claim grows out of the same contract or subject matter out of which appellee's claim grew, and his acceptance of the building and paying for the work and materials would not prevent appellant from recouping his damages, unless he accepted the house in full discharge of the contract or otherwise waived his right to recoup. Fatep v. Fenton, 66 Ill., 457; Adlord v. Hulbsen, 45 Ill., 193; Feit v. Smith, 62 Ill. App., 637; Underwood v. Wolf, 131 Ill., 425.

Latent defects in work under a building contract, not open to inspection are not waived by the acceptance of the

work in ignorance of their existence. Contractors are bound to know of defects in their work, and of the failure of such work to comply with the contract, whether done by themselves or their sub-contractors. Monahan v. Fitzgerald, 164 Ill., 535.

The law gives to the owner in a building contract, as well as to the contractor, the full benefit of his contract, and the architect who is to merely superintend the work and pass on the quality and fitness of the materials as measured by the contract has no power or right to waive for the owner his right to insist on the character of the work and materials called for in the contract. Such authority must be given by the contract or by the assent of the owner, before it can be said to exist.

In this contract in question the owner or the owner and the architect may waive any of its provisions, but the architect alone can not waive the provisions thereof as to the defects aforesaid. If it could be said to be the owner's fault that the veneer cracked and checked, that is, that he insisted on its being put up in cold damp weather with full notice that that would crack and check it, that would be a different proposition. His evidence is that he knew nothing of the fact that gum wood had been used until after he settled for the work, and this is not seriously contradicted by any one. While he assisted in selecting the veneering, there seems to be no objection to it by the contractor or sub-contractor, and hence there was no waiver of the guaranty clause.

All such questions on waiver are properly a matter of evidence to be again considered by court or jury on another trial. The court erred in not allowing appellant to recoup his damages, but it is not a matter for us to give judgment for here. Both parties are entitled to a trial on those issues.

As these matters were offered under the general issue with notice, appellee was not required to file any further

pleadings whatever than the similiter to the general issue. Burgain v. Babcock, 11 Ill., 28; Bailey v. Valley N. Bank, 137 Ill., 382.

The record also shows that appellee's counsel asked appellant to permit appellee, or an expert to examine the wood work, with a view to meeting by rebuttal evidence the evidence of appellant's damages to the veneering. This request was refused in the face of appellee's claim that appellant's damages were exaggerated, and that the photographs introduced by him were faked, and in the face of proof that such photographs could be taken so as to greatly exagerate the cracks and checks. Appellee was thus put to great disadvantage in showing up the real truth of the very matters in issue. Appellant had the right to refuse to grant the permission and the court had no power to compel him to thus open up his residence. Such refusal, however, should in our judgment be considered by court or jury as a circumstance or act discrediting his claim of defects.

What the Supreme Court of Pennsylvania said in sustaining the lower court for allowing evidence of such a refusal in a similar case heard by a jury, meets our approval. "To smother evidence is not much better than to fabricate it. A party who shuts the door upon a fair examination, and thus prevents the jury from learning a material fact, must take the consequence of any honest imagination which his conduct may excite. The presumption, in odium spolia toris, is perfectly legitimate. It is so natural and so just that it is a part of every civilized code." Bryant v. Stilsell, 84 Pa. St., 314.

We shall not undertake to consider in detail the fifty-one so-called propositions of law passed on by the court.

The judgment of the court is reversed and the cause remanded.

REVERSED AND REMANDED.

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